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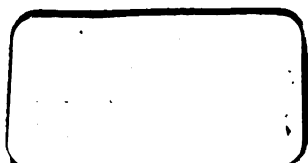
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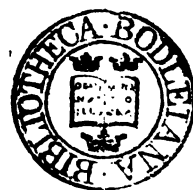
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THE
LAW
OF
CONTRACTS AND PROMISES
UPON
VARIOUS SUBJECTS 23
AND
WITH PARTICULAR PERSONS,
AS SETTLED IN THE
ACTION OF ASSUMPSIT.
IN THREE PARTS.

By **SAMUEL COMYN, Esq.**
OF THE MIDDLE TEMPLE, BARRISTER AT LAW.

The Second Edition,
WITH CONSIDERABLE ALTERATIONS AND ADDITIONS.

LONDON:
PRINTED BY A. STRAHAN,
LAW-PRINTER TO THE KING'S MOST EXCELLENT MAJESTY;
FOR JOSEPH BUTTERWORTH AND SON, LAW-BOOKSELLERS,
43. FLEET-STREET;
AND J. COOKE, ORMOND-QUAY, DUBLIN.
1824.



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A NEW edition of this Work having been called for, the Author has carefully reviewed the various subjects of which it treated; and, to render the Work as generally useful as possible, has thought it advisable to make an entirely new arrangement. He has also abridged many of the cases cited in the former edition, and added such as have been determined since its first Publication. The present Edition is now submitted to the Public in the hope that the Work will still be found, as the Author originally intended it to be, a useful book of reference; and that it will save the necessity of a long and laborious research into a vast variety of detached reports of cases which the particular subjects here treated of embrace.

S. C.

Serjeant's Inn, Fleet Street,
July, 1st, 1824.

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THE LAW

OF

CONTRACTS AND PROMISES.

PART THE FIRST.

CHAPTER I.

OF THE GENERAL NATURE AND PARTS OF A CONTRACT AND PROMISE.

A CONTRACT is an agreement or mutual bargain between two contracting parties; and is entered into either verbally, that is, by word of mouth only, or in writing. When reduced into writing, it is either subscribed with the hands and seals of both the contracting parties, or merely with one or both of their signatures. Such contracts or agreements as are reduced into writing under hand and seal, are technically called *deeds* or *specialties*; and those which are merely verbal, or in writing not under seal, are denominated *simple contracts*, or contracts by *parol*: for it is said, (a) that “by the law of *England* all contracts are distinguished into agreements by specialty and agreements by parol.” A promise is in the nature of a verbal covenant, and is either express or implied. The present work will treat only of agreements not under seal; for in trade and commerce, as well as in the ordinary transactions of business between individuals, contracts and agreements are most commonly entered into either by word of mouth, or in writing with their signatures merely. Contracts and agreements of this description, however, are oftentimes expressed in such vague and uncertain terms as to render it extremely difficult to determine the real meaning and intention of the parties; and it not unfrequently happens that questions arise either upon the legality of the subject matter of the contract or promise; the competency of the parties to contract; or the extent of their respective liabilities. When these dif-

(a) Per Ld. Ch. B. *Skyner*, 7 Term Rep. 350. n. a.

difficulties occur, they too frequently give birth to disputes and differences between the parties, and commonly terminate in an action at law, which is technically called an action of *assumpsit*, and is prosecuted either for the recovery of a fixed and ascertained sum of money, or for uncertain and unliquidated damages for the non-performance of the contract or promise; and these damages can only be reduced to a certainty by the verdict of a jury.

The species of contract proposed for consideration is defined in our law books, to be a bargain or agreement voluntarily made, upon a good consideration, between two or more persons capable of contracting, to do or forbear to do some lawful act; as if a man sells or exchanges cattle or goods for money or any other commodity, or agrees, in consideration of a sum of money, to make a lease of lands, or forbear to prosecute a legal claim, &c. And these are valid contracts, because there is, what lawyers term *quid pro quo*, or one thing for another. But, if a man without any other consideration than mere good will, or natural affection, make a voluntary promise to give to another a sum of money, as for instance, 20*l.*, and that he will be his debtor for that sum; this is no contract, but a mere naked promise or *nudum pactum*: for, however a man may or may not be bound to perform such a promise in honour or conscience, which the municipal laws of this country do not take upon them to decide, certainly those municipal laws will not compel the execution of what he had no visible inducement to engage for: and therefore our law has adopted the maxim of the civil law that, *ex nudo pacto non oritur actio*. But any degree of reciprocity will prevent the agreement or promise from being classed under this rule; and therefore, in the instance put, if any thing, however trifling, were done, or to be done or given for the 20*l.*, it would be a valid contract, and binding upon the parties. (b) And it is observed, (c) that every contract and agreement ought to be so certain and complete that each party may have an action or other remedy upon it; and for this purpose six things appear necessary to concur; 1. A person able to contract; 2. A person capable to be contracted with; 3. A thing to be contracted for; 4. A good and sufficient consideration or *quid pro quo*; 5. Clear and explicit words to express the contract or agreement; 6. The assent of both the contracting parties. (d) So, every contract should be obligatory on both the contracting parties, or both should be at liberty to recede therefrom. (e) But to an agreement or contract there is no prescribed form of words, but any words which show the assent of the parties are sufficient. (f)

A contract or agreement conveys an interest either in *possession*, or

(b) *Termes de Ley*, tit. Contract. Pl. Com. 302. 2 Bl. Com. 445.
(c) Pl. Com. 5.

(d) *Vide* Pl. Com. 164. Co. Lit. 55. (b)
(e) 5 Term. Rep. 655.
(f) 2 Bl. Com., 445.

in *action*; as if A. agrees to change horses with B., and they do it immediately; or if goods are sold and delivered and paid for at one time; here the possession and the right are transferred together; and such contract or agreement being executed and complete, is commonly termed an *executed* contract. But where A. for a valuable consideration contracts with B. to pay him 100*l.* at a day to come; in this case, though A. thereby transfers a property or interest in such sum to B., yet such property or interest is not in *possession*, but in *action* merely, and recoverable by suit at law; and the contract not being performed is therefore usually denominated an *executory* contract. (*g*)

2. OF EXPRESS CONTRACTS AND PROMISES.

Contracts and agreements without seal are either expressed or implied. *Express* contracts are where the terms of the bargain, agreement, or promise, are openly uttered and expressed by the contracting parties themselves. The subject matter of this class of contracts relates either to the person or property of the contractors, and may be either to do or forbear to do a particular act; as, to pay money on the sale or exchange of cattle or goods; to pay rent for the use and occupation of lands or houses; to pay money on particular mercantile securities or agreements; to pay the debt of a third person; to pay money won or lost at play; to perform works; to accept, deliver, or take back goods, &c.; to accept, transfer, or replace stock; to let or take lands or houses; to warrant the title to lands; to warrant the soundness or quality of cattle or goods; to indemnify; to marry; to forbear to sue; not to trade within a particular distance, &c. And these contracts or promises ought to be certain and explicit; but certainty to a common intent is sufficient: (*h*) as, if a man promises another, in consideration that he will assign to him a certain term, to pay him 10*l.*, this is a good *assumpsit*, though the time of the assignment and the payment be not appointed; for the 10*l.* shall be paid in a convenient or reasonable time after the assignment, which also must be made within a reasonable time after the agreement. (*i*) Or, if A. be indebted to B. for certain things to him sold, and C. comes to B. and, for a good consideration, promises him that if A. should not pay him the money he will pay it for him; an action upon the case lies for B. against C. upon this promise if A. does not pay the money within a convenient or reasonable time; for so shall the promise be taken, *viz.* that if A. does not pay it in a convenient time, that then C. will pay it for him. (*k*)

(*g*) Pl. Com. 140.

(*i*) 1 Rol. Abr. 14. l. 50.

(*h*) Com. Dig. tit. Action of Assumpsit,
A. 3. 4.

(*k*) 1 Rol. Abr. 15. l. 5.

So, where A., in consideration that B. would marry his daughter, promised to give with her a child's part, and that at the time of his death he would give to her as much as to any of his children, except his eldest son; this was holden to be a good promise; for though a child's part is in itself altogether uncertain, yet, it being shown what the rest of the children had, except the eldest, it is then reduced to a sufficient certainty. (l) So, a promise to give a bond for 40*l.*, without saying in *what penalty*, is good; for it shall be intended double the sum. (m)

But, where the plaintiff declared that, whereas there was a communication between him and the defendant concerning the bark of certain wood, and that thereupon it was agreed, that the defendant should give to the plaintiff two shillings *per* seam for all the bark of such wood as the plaintiff should cut; and that the defendant assumed and promised to have ready upon a certain day articles in writing purporting that agreement, and an obligation for performance thereof, &c., the declaration was holden not to be good, because it was not said in what sum the obligation was to be, and a certain sum could not be intended, because the number of seams were altogether uncertain. (n) No express contract or agreement can be raised from a mere casual speaking, or declaration in discourse; as, if there be a discourse between the father of A. and B. in relation to a marriage between A. and the daughter of B.; and B. in that discourse declares and publishes to the father of A. *that he would give to him who should marry his daughter with his consent* 100*l.*, and A. after this declaration marries the daughter of B. with his consent; yet it was holden, that this declaration and publication of B. shall raise no promise upon which an action of *assumpsit* may be brought; for these general words do not include any promise, and the agreement must be complete upon which an express *assumpsit* lies. (o)

3. OF IMPLIED CONTRACTS OR PROMISES.

Implied contracts or promises are such as reason and justice dictate, and which therefore the law presumes that every man undertakes to perform. As, if a person is employed by another to do any business for him, or perform any work, and nothing is agreed upon as to the price of his labour, the law implies that the employer undertook or contracted to pay the person so employed as much as he reasonably deserves for his labour. So, where a man orders goods of a tradesman without any agreement of price, the law concludes that the buyer contracted to pay to the seller their real value. (p) And from hence it

(l) Poph. 148. 2 Rol. Rep. 104.

(m) 1 Lev. 88.

(n) 1 Sid. 270.

(o) 1 Rol. Abr. 6. l. 40. Com. Dig. tit. Action of Assumpsit. F. 2.

(p) 2 Bl. Com. 443.

may be collected that all implied contracts or promises are founded on some legal liability to pay a debt, or perform a duty. Therefore, besides the instances just mentioned, when money is lent and advanced, paid, laid out, and expended, or had and received; and nothing is expressly stipulated by the parties as to the repayment thereof, the law raises an *implied* promise that it shall be repaid upon request. So, when money is due on an account stated, or for fines on admissions into copyhold premises; for fines and duties payable to corporations; for fees payable to particular officers; for petty customs and tolls; for general average; for the salvage of ship or goods; for the carriage or wharfage of goods; for money due on awards, or foreign judgments: So also, as between landlord and tenant, that the latter shall use his farm, &c. in a husband-like and proper manner: in these instances also, and various others which might be mentioned, though no express agreement be made, a legal liability arises, and the law presumes that the party promised to pay the debt, or perform the duty.

The last class of contracts implied by reason and construction of law, arises upon this supposition, that every one who undertakes any office, employment, trust, or duty, contracts with those who employ or entrust him, to perform it with integrity, diligence, and skill: and if, by his want of either of those qualities, any injury accrues to individuals, they have therefore their remedy in damages by action. A few instances will fully illustrate this matter; as, if a surgeon, attorney, or any other professional person is guilty of neglect of duty, or a palpable breach of it, he is liable to an action on an implied *assumpsit* or promise for a reparation in damages for the injury sustained in consequence of such neglect. There is also in law always an *implied* contract with a common innkeeper, common carrier, wharfinger, warehousekeeper, or other bailee to be answerable for the goods entrusted to their care; with a common farrier that he shoes a horse well without laming it; with builders and other workmen that they perform their business in a workman-like manner; in which if they fail, an action on the case, either in *tort* or *assumpsit*, lies to recover damages for the breach of their general undertaking. But if a person is employed to transact any of these concerns, whose common profession and business it is not, the law implies no such *general* undertaking; but in order to charge such person with damages an *express* agreement is required. (q)

It is difficult to state with certainty what contracts and promises are exclusively implied; though, as a general rule, it may be observed, that promises in law only exist where there is no express stipulation between the parties; for *expressum facit cessare tacitum*. (r)

(q) 3 Bl. Com. 165.

(r) Per Buller, Just. 2 Term Rep. 105

4. OF THE PARTIES TO A CONTRACT.

The parties to a contract are two or more, namely, the person or persons who contract the obligation to do or forbear to do a particular act, and the person or persons in whose favour it is contracted. And, generally speaking, all persons, except infants and married women, having capacity and understanding, may, by mutual assent, become parties to a contract and bind themselves and their personal representatives to a performance thereof. (s) In some cases indeed, as will be shown in a subsequent part of this work, infants and married women may legally enter into a contract. The contracts of idiots, lunatics, or other persons labouring under a defect in the understanding, of such a nature as to render them incapable of comprehending the engagements they enter into, may be avoided. (t) It has also been determined, that a contract entered into by a man so drunk as to be wholly unable to understand what he was doing, is void at common law. (u) And though this decision may at first view appear to intrench upon the old common law maxim, viz. *that a man shall not be permitted to stultify himself*; (v) yet upon reflection it will be found to be rather an exception to the general rule than an infringement upon it.

So, a contract or promise made by a person under duress or unlawful imprisonment, or under any other violent menace or constraint, which has the effect of preventing him from exercising the free use of his understanding and judgment, may be avoided. (w) So, no contract can legally be entered into between a *British* subject and an alien enemy. (x) It may also be observed, that persons under judgment of outlawry, attainer of treason or felony, are incapacitated from making a contract for their own benefit; for, being considered in law as civilly dead, they cannot sue in any court of law; indeed their property, as well as all rights of action in respect thereof, are vested in the crown. (y)

Contracts and agreements are entered into by individuals either for themselves or third persons; and the liability of the parties thereto must wholly depend upon the general nature and terms of the contract. Thus, where A. B. and C. on behalf of themselves and other members of a club, entered into articles of agreement with D. to provide necessaries for the use and accommodation of the club; it was holden that the three were personally bound by such articles, and that D. was not

(s) 1 Bac. Abr. tit. Agreements. A.

(t) *Yates v. Boen*, Stra. 1104.

(u) Bul. Ni. Pri. 172. and *Pitt v. Smith*, 5 Camp. Rep. 53.

(v) See Co. Lit. 247. 2 Bl. Com. 291, 2.

(w) 2 Inst. 482. 1 Bl. Com. 136. Bul. Ni. Pri. 172.

(x) *Brandon v. Nisbet*, 6 Term Rep. 23. *Bristow v. Towers*, ib. 35.

(y) See the recent case of *Bullock v. Dodd*, 2 Barn. & Ald. 268. where the authorities on this subject are cited.

obliged to resort to any of the other members for satisfaction of his demands (z).

5. OF THE CONSIDERATION TO SUPPORT A CONTRACT OR PROMISE.

It is essential to every contract or promise, that it be founded upon a good consideration. The civilians hold, that in all contracts, either express or implied, there must be something given in exchange, something that is mutual or reciprocal. This thing, which is the price or motive of the contract, we call the consideration; and it must be a thing lawful in itself, or else the contract is void. A contract for any *valuable* consideration, as for marriage, for money, for work done, or for other reciprocal contracts, can never be impeached at law; and, if it be of sufficient adequate value, is never set aside in equity; for the person contracted with has then given an equivalent in recompence, and is therefore as much an owner, or a creditor, as any other person. (a)

These considerations are divided by the civilians into four species
1. *Do, ut des*; as, when I give money or goods on a contract, that I shall be repaid money or goods for them again. Of this kind are all loans of money upon bond, or promise of repayment, and all sales of goods, in which there is either an express contract to pay so much for them, or else the law implies a contract to pay so much as they are worth. 2. The second species is *facio, ut facias*: as, when I agree with a man to do his work for him, if he will do mine for me; or if two persons agree to marry together; or to do any other positive acts on both sides: or, it may be to forbear on one side in consideration of something done on the other; as, that in consideration A., the tenant, will repair his house, B., the landlord, will not sue him for waste: or, it may be for mutual forbearance on both sides; as, that in consideration that A. will not trade to *Lisbon*, B. will not trade to *Marseilles*, so as to avoid interfering with each other. 3. The third species of consideration is *facio, ut des*: when a man agrees to perform any thing for a price, either specifically mentioned, or left to the determination of the law to set a value on it. And when a servant hires himself to his master for certain wages, or an agreed sum of money; here the servant contracts to do his master's service, in order to earn that specific sum: otherwise, if he be hired generally; for then he is under an *implied contract* to perform this service for what it shall be reasonably worth. 4. The fourth species is *do, ut facias*: which is the direct counterpart of the preceding. As when I agree with a servant, to give him such wages upon his

(z) *Duke of Queensbury and others v. Horsley v. Bell*, 1 Bro. Ch. Cas. 101. in *Cullen*, 1 Bro. Parl. Cas. 396. 8vo. edit. *notis*.

(a) 2 Bl. Com. 444.

performing such work, which, we see is nothing else but the last species inverted: for *servus facit, ut herus det*, and, *herus dat, ut servus faciat*. (b) A consideration of some sort or other is so absolutely necessary to the forming of a contract, that a *nudum pactum*, or agreement to do or pay any thing on one side, without any compensation on the other, is totally void in law; and a man cannot be compelled to perform it. (c) But it is observed, (d) as this rule was principally established, to avoid the inconvenience that would arise from setting up mere verbal promises, for which no good reason could be assigned, it therefore does not hold in some cases where such a promise is authentically proved by written documents. For if a man enters into a voluntary bond, or gives a promissory note, he shall not be allowed to aver the want of a consideration in order to evade the payment; for every bond from the solemnity of the instrument, and every note from the subscription of the drawer, carries with it an internal evidence of a good consideration. Courts of justice will therefore support them both as against the contractor himself; but not to the prejudice of creditors or strangers to the contract. This observation, as far as it respects promissory notes, and other written contracts not under seal, is certainly supported by the opinion of Mr. Justice *Wilmot*, in the case of *Pillans v. Van Mierop*, (e) who said, "I cannot find that a *nudum pactum* evidenced by writing has ever been holden bad; and I should think it good, though where it is merely *verbal*, it is bad. Yet I give no opinion upon its being good always when in writing." The law, however, on this point is now settled; and the rule is, that a verbal agreement, or promise, though reduced into writing, is not valid, without a good consideration. Thus, in the case of *Rann* and another, executors of *Mary Hughes v. Isabella Hughes*, administratrix of *J. Hughes* (f), the declaration stated, that on the 11th June 1764, divers disputes had arisen between the plaintiff's testator and the defendant's intestate, which they referred to arbitration; that the arbitrator awarded that the defendant's intestate should pay to the plaintiff's testator 983*l*. That the defendant's intestate afterwards died possessed of effects sufficient to pay that sum; that administration was granted to the defendant; that *Mary Hughes* died, having appointed the plaintiffs her executors; that at the time of her death the said sum of 983*l*. was unpaid, "by reason of which premises the defendant as administratrix became liable to pay to the plaintiffs as executors the said sum, and being so liable she, in consideration thereof, undertook and promised to pay, &c." Upon a writ of error in the *House of Lords*, after argument, the following question was proposed to the Judges by the Lord Chancellor, "Whether sufficient matter

(b) 2 Bl. Com. 445

(c) Ibid.

(d) Ibid.

(e) 3 Burr. 1671.

(f) 7 Term Rep. 350. n. a. 7 Bro. Parl. Cas. 551. S. C.

appeared upon the declaration to warrant after verdict the judgment against the defendant in error in her personal capacity?" Upon which the Lord Chief Baron *Skyner* delivered the opinion of the Judges to this effect:—"It is undoubtedly true, that every man is by the law of nature bound to fulfil his engagements. It is equally true, that the law of this country supplies no means, nor affords any remedy to compel the performance of an agreement made without sufficient consideration; such agreement is *nudum pactum ex quo non oritur actio*; and whatsoever may be the sense of this maxim in the civil law, it is in the last-mentioned sense only that it is to be understood in our law. The declaration states that the defendant being indebted as administratrix, promised to pay when requested, and the judgment is against the defendant generally. The being indebted is of itself a sufficient consideration to ground a promise, but the promise must be co-extensive with the consideration, unless some particular consideration of fact can be found here to warrant the extension of it against the defendant in her own capacity. If a person indebted in one right, in consideration of forbearance for a particular time promise to pay in another right, this convenience will be a sufficient consideration to warrant an action against him or her in the latter right: but here no sufficient consideration occurs to support this demand against her in her personal capacity; for she derives no advantage or convenience from the promise here made. For if I promise generally to pay upon request, what I was liable to pay upon request in another right, I derive no advantage or convenience from this promise, and therefore there is not sufficient consideration for it. But it is said, that if this promise is in writing, that takes away the necessity of a consideration, and obviates the objection of *nudum pactum*, for that cannot be where the promise is put in writing; and that after verdict, if it were necessary to support the promise that it should be in writing, it will, after verdict, be presumed that it was in writing; and this last is certainly true: but that there cannot be *nudum pactum* in writing, whatever may be the rule of the civil law, there is certainly none such in the law of England. All contracts are by the laws of England distinguished into agreements by specialty, and agreements by parol; nor is there any such third class, as some of the counsel have endeavoured to maintain, as contracts in writing. If they be merely written and not specialties, they are parol, and a consideration must be proved. His Lordship also observed upon the case of *Pillans v. Van Mierop* (*), and the case of *Losh v. Williamson*, Mich. 16 G. 3. in B. R. and so far as these cases went on the doctrine of *nudum pactum*, he seemed to intimate that they were erroneous. And he concluded by saying, that all his

(*) 3 Burr. 1663.

Brothers concurred with him, that in this case there was not a sufficient consideration to support this demand, as a personal demand against the defendant, *and that its being now supposed to have been in writing* makes no difference. The consequence of which is, that the question put to us must be answered in the negative."

The same rule also applies to promissory notes and bills of exchange, as well as to all other contracts in writing without seal. This rule, however, extends only to the immediate parties to a bill or note, and does not affect third persons, who happen to be strangers to the want of consideration as between those parties. For instance, if an action be brought upon a note or bill, at the suit of the payee against the drawer, or, by the indorsee against the indorser, for which no consideration was given, the plaintiff, in either case, cannot recover. But the want of consideration, as between the maker and payee of a note or bill, cannot be set up in an action against either of them at the suit of an indorsee, unless it be proved that he was acquainted with this circumstance at the time of taking the note or bill. (g) And the reason why third persons ought not to be affected by this rule is, that bills and notes being negotiable instruments, by mere indorsement and delivery, it would be enabling the original parties to assist in a fraud, if they were to be allowed to set up the want of consideration, as between themselves, in bar to an action against either of them, at the suit of an indorsee for a valuable consideration. And Lord Mansfield is reported to have said, that "in commercial cases amongst merchants, the want of consideration is not an objection." (h) But this observation, it is apprehended, must be understood to apply only to cases of bills and notes when in the hands of an indorsee; for in all other contracts and agreements, not under seal, whether mercantile or otherwise, a consideration is absolutely necessary. Indeed, a bargain without a consideration is said to be a contradiction in terms, and cannot exist. (i) I now proceed to show what consideration will support a contract or promise. It is a settled rule of law, that to make a contract or agreement obligatory, the consideration must be either a benefit to the party promising, or some trouble or prejudice to the party to whom the promise is made; otherwise the contract or agreement is considered as *nudum pactum*, and cannot be enforced. (k) Thus, a *promise in consideration of the forbearance of a suit for a certain time, is good*; for that is for the benefit of the defendant, though the action is not discharged. (l) But, a promise in consideration of forbearance is not valid where there was originally

(g) Vide Bayley on Bills, 121. 2d edit.
Chitty on Bills, 12. 88. 5th edit.

(h) 3 Burr. 1669.

(i) Per Lord Loughborough, 2 Ves. jun.
408.

(k) Com. Dig. tit. Action on the Case
upon Assumpsit, B. 1.

(l) Cro. El. 387.

no cause of action; as, in consideration of forbearance of a suit upon a contract made by a married woman. (m) A promise *in consideration of surceasing of a suit is good*; for that is a benefit to the defendant, and a prejudice to the plaintiff, though the action is not discharged. (n) So, in consideration of the discharge of a debt, or the delivery of a bond, or other security. (o) Or, *in consideration of the proof of a debt*, for it is a charge to the plaintiff; as, if an executor promise, in consideration of the proof of the delivery of goods to his testator, to pay for them. (p) So if the parties agree to a particular manner of trial of the validity of a debt, it shall be determined in such manner. (q)

So, *in consideration of any particular service or labour by the party to whom the promise is made*; as, to procure the enjoyment of a house (r); or to procure a note, &c. from the debtor of the party promising. (s) Or, in consideration that the plaintiff would act for the defendant as a commissioner to examine witnesses. (t) Or, *in consideration of permission to do an act*; as, to permit a wife to take out administration *durante minori ætate* of her son; for it does not belong to her. (u) Or, in consideration of leave of absence from a regiment for a reasonable time. (x)

So, *in consideration of any other act, by which the defendant has benefit*; as, in consideration that the plaintiff would deliver to the defendant certain goods, in which the plaintiff had only a special property; for the defendant has a benefit by the present possession. (y) Or, in consideration of the release of an equity of redemption. (z) Or, a promise in consideration of the assignment of an uncertain debt. (a) Or, to accept a bill in consideration of the acceptance of another of equal amount. (b)

So, *in consideration of marriage*; as, upon a communication of a marriage, a cousin of the husband promises the wife to give her 100*l.* if the husband's father does not assure such land. (c) So, a discharge of a promise of marriage by a woman to a man is a good consideration. (d) So, *in consideration of the voluntary performance of an act, which the plaintiff was compellable to perform*; as, if the plaintiff will discharge a debt, for which he and the defendant are sureties, the defendant will repay the moiety. (e) Or, a promise to cancel a bond in consideration that the obligee will pay the single sum due upon it. (f) A promise for

(m) Stra. 94.

(n) Hob. 216. 2 Bulst. 41.

(o) Com. Dig. tit. Action upon Assumpsit, B. 5.

(p) 1 Leon. 93. 1 Sid. 57. 369.

(q) 3 Lev. 241.

(r) Yelv. 11.

(s) 2 Vent. 71. 74.

(t) Show. 342.

(u) 1 Rol. Abr. 21. l. 30.

(x) 1 Ld. Raym. 512.

(y) Cro. El. 218.

(z) 1 Ld. Raym. 662.

(a) 2 Bl. Rep. 820.

(b) 7 Term Rep. 569. 2 H. Bl. 570.

(c) Cro. El. 63, 4.

(d) Sty. 295. 303.

(e) 1 Rol. Abr. 20. l. 50.

(f) Cro. Car. 8.

promise is a good consideration ; as, in consideration of a reciprocal promise of marriage. Thus, in the case of *Hebden v. Rutter*, (g) the plaintiff declared, that in consideration that she promised to marry the defendant, the defendant promised to marry the plaintiff ; and averred that the plaintiff requested the defendant to marry, but the defendant refused, &c. To this declaration the defendant demurred : and it was said, that there was not any consideration ; for marriage is a matter merely spiritual, and no ground for *assumpsit* at common law. *Sed per curiam*, “ the declaration and consideration in this case are good ; for marriage is a preferment, and the loss of it is a temporal loss.” So, where one *Nichols* brought an action of *assumpsit* against *Raynbred*, declaring that in consideration, that *Nichols* promised to deliver to *Raynbred* a cow, *Raynbred* promised to deliver him 50s. This was adjudged a sufficient consideration, it being promise for promise. (h) But it is said, (i) that mutual promises must be made at the same time, otherwise they will be *nuda pacta*.

We have before seen (k) that a consideration of some sort or other is so absolutely necessary to the forming of a contract, that a *nudum pactum* or agreement to pay any thing on one side, without any compensation on the other, is actually void in law, and a man cannot legally be compelled to perform it. Therefore if a man *gratuitously*, or in consideration of *natural affection* or of *friendship*, promises another to give him a sum of money on a day to come, this is *nudum pactum*, and cannot be enforced at law : for though a gratuitous undertaking, seriously made, is certainly sufficient, to form the basis of a moral and honorary obligation, and ought not to be receded from without some adequate reason, yet, a person making such a promise does not thereby intend to subject himself to legal responsibility ; and the object of the law is rather to give effect to contracts founded upon the mutual exigences of society, than to compel the execution of a voluntary engagement of mere donation. So, if one buy goods for money, and no money be paid, nor earnest given, nor day set for payment, nor the goods, or any part of them, delivered ; here no action lies for the money, or the goods sold, but the owner may sell them to another if he will ; there being no consideration, but a mere agreement to buy. (l) Again, where A. having proposed to sell goods to B. gave him a certain time at his request to determine whether he would buy them or not ; B. within the time determined to buy them, and gave notice thereof to A. ; yet it was holden that A. was not liable to an action for not delivering them ; for B. not being bound by the original contract, there was no consideration to bind A. (m) Or, where a carpenter had undertaken to build a house, and

(g) 1 Sid. 180.

(h) Hob. 88. See also Cro. El. 543.

703. 1 Wils. 88. S.P.

(i) Hob. 88.

(k) Ante, 8.

(l) Dy. 50. a. Shep. Touch. 224.

(m) 3 Term Rep. 653.

for the not doing it, the party brought an action against the carpenter, but because it did not appear that he was to have any thing for building the house, it was adjudged that the action would not lie. (n)

So, if the *consideration be not beneficial to the party promising, nor any trouble or prejudice to the party to whom the promise is made*, it is not good: as, if a promise be made by an executor, or an heir at law who has no assets, in consideration of forbearance, to pay the debt of the testator. (o) Or, if an heir promise in consideration of the forbearance of a suit in *Chancery*, to which he was not liable. (p) So, if a man promise payment to an assignee, in consideration that he will accept him for his debtor. (q) Or, in consideration of relinquishing an *assumpsit*, which was void (r); or, in consideration of a discharge from a tortious arrest. (s) Again, if a woman after the death of her husband promise, in consideration that the plaintiff, a creditor of her late husband, will permit her to take out administration to her husband, she will pay him his debt, this is not a valid consideration; for the administration belongs to the wife. (t) So, in consideration of a lease at will, for he may determine it at his pleasure. (u) But if there be any benefit, labour, or prejudice, however trifling, it is deemed a sufficient consideration: as in the case of *Sir Anthony Sturlyn v. Albany*, (x) the plaintiff had made a lease to J. S. of land for life rendering rent; J. S. granted all his estate to the defendant; the rent was behind for several years; the plaintiff demanded the rent of the defendant, who promised, that if the plaintiff could show to him a deed that the rent was due, he would pay to him the rent and arrearages: the plaintiff alleged that on such a day, &c. he showed the defendant the indenture of lease by which the rent was due; but notwithstanding this, the defendant refused to pay the rent and arrearages due for four years; and for the recovery thereof the action was brought. A motion was made in arrest of judgment, that there was no consideration to ground an *assumpsit*; for the mere showing of the deed is no consideration in law. But the Court gave judgment for the plaintiff upon this ground, that when a thing is to be done by the party to whom the promise is made, be it never so small, this is a sufficient consideration to support an action; and here the showing of the deed was to avoid a suit.—The reporter makes the following note: “In this case it was alleged, that it had been adjudged, when one assumeth to another, that if he can show him an obligation in which he was bound to him, that he would pay him, and he did show the obligation, &c. that no action lieth upon

(n) Pl. Com. 509. 2 Ld. Raym. 919.
5 Term Rep. 143. 149.

(o) Mo. 782, 3.

(p) Cro. El. 206.

(q) 1 Saund. 210.

(r) 1 Rol. Abr. 26. l. 10.

(s) Yelv. 25, 6.

(t) Mo. 685.

(u) 1 Rol. Abr. 23. l. 57.

(x) Cro. El. 67. 150.

this *assumpsit*; which was affirmed by the justices." And in *Foster v. Scarlett*, (y) the plaintiff declared, that whereas he and one *Willington* submitted themselves to the arbitrament of A. and B. of all matters, &c.; that A. and B. awarded the plaintiff should release to *Willington* all debts which he owed him; and that *Willington* should assure to the plaintiff certain lands which he held for life, the reversion to the plaintiff; and that the defendant and one *Putter*, who pretended to have a lease of the lands, should seal a deed to the plaintiff, that they should assure to the plaintiff their lease and interest in the said lands; that after the arbitrament, in consideration that the plaintiff did assume to *Willington* to stand to and perform the arbitrament, the defendant did assume, that he and *Putter*, upon a request made to them, would convey the said land to the plaintiff: the plaintiff averred that he had performed the award on his part, and had requested the defendant that he and *Putter* would convey the land, &c. which they had not done. — It was moved in arrest of judgment that there was no consideration to bind the defendant, for he took no benefit thereby. But the Court held clearly the contrary, that it was a good consideration; for by reason of the promise the plaintiff was drawn to make the release; and it is not material that the defendant took no benefit by the release. So, the common law, in some cases, considers the mere entrusting a thing with another, and his undertaking the care of it, a sufficient consideration for his faithful discharge of the trust. And therefore, though a person who gratuitously engages to do an act for another, is not liable in law to an action for not doing it; yet if goods are delivered to him, and he undertakes to carry them, or do something about them without any reward, an action of *assumpsit* will lie on this bailment, if there be any neglect on the part of the bailee by which the goods are spoiled.

This was one of the points settled in the case of *Coggs v. Bernard*, (z) which was an action of *assumpsit*, wherein the plaintiff declared, that, whereas the defendant undertook safely and securely to take up several hogsheads of brandy, then in a certain cellar in D. and safely and securely to lay them down again in a certain other cellar in W., but that the said defendant and his servants so negligently and improvidently put them down again into the said other cellar, that for want of care in the defendant and his servants, one of the casks was staved, and a great quantity of brandy was lost. A motion was made in arrest of judgment, because it was not alleged in the declaration that the defendant was a common porter, nor averred that he had any thing for his pains. But to the second objection, "that there was no consideration to ground the promise, and that the undertaking was *nudum pactum*," *Holt*, Chief Justice, and the rest of the court, answered, that the owner's trusting

(y) Cro. El. 70.

(z) 2 Ld. Raym. 909.

the defendant with the goods, was a sufficient consideration to oblige him to a careful management. Indeed, if the agreement had been executory, to carry these brandies from one place to the other such a day, the defendant had not been bound to carry them; but this was a different case; for *assumpsit* did not only signify a future agreement, but in such a case as this, it signifies an actual entry upon the thing, and taking the trust upon himself. And if a man will do that, and miscarries in the performance of his trust, an action will lie against him for that, though nobody could have compelled him to do the thing. And upon the same principle, it was holden, (a) that if a carpenter undertakes to build or repair a house, and he does it unskilfully, an action on the case will lie against him for his misfeazance, though no consideration be alleged.

6. OF PROMISES UPON A CONSIDERATION PREVIOUSLY EXECUTED.

If the consideration is wholly past and executed, it will not support a subsequent promise, unless the consideration was executed either at the express or implied request of the party promising. For it is not reasonable that one man should do another a kindness, and then charge him with a recompence; as it would be obliging him whether he would or not, and bringing him under an obligation without his concurrence. This was determined in the case of *Hunt v. Bate*; (b) the servant of a man was arrested and imprisoned in the Compter in London for a trespass; and he was let to mainprize by the manucaption of two citizens of London (who were well acquainted with the master), in consideration that the business of the master should not go undone. And afterwards, before judgment and condemnation, the master, upon the said friendly consideration, promised and undertook to one of the mainperners to save him harmless against the party plaintiff, from all damages and costs, if any should be adjudged, as happened afterwards in reality; after this the surety was compelled to pay the condemnation, amounting to thirty-one pounds, &c. And thereupon he brought an action on the case, and the undertaking was traversed by the master, and found in London at *nisi prius* against him. But it was afterwards moved in arrest of judgment, that the action did not lie. And by the opinion of the Court, "the action does not lie in this matter, because there is no consideration wherefore the defendant should be charged for the debt of his servant, unless the master had first promised to discharge the plaintiff before the enlargement, and mainprize made of his servant, for the master did never make request to the plaintiff for his servant

(a) 2 Ld. Raym. 919, 920. 5 Term Rep.
149.

(b) Dy. 272. a.

to do so much, but he did it of his own head." Wherefore judgment was given for the defendant. But, in the same report, it is added, that in another like action brought upon a promise of twenty pounds made to the plaintiff by the defendant, in consideration that the plaintiff, *at the special instance of the said defendant*, had taken to wife the cousin of the defendant; it was holden that this was a good consideration, although the marriage was executed and past before the undertaking and promise, *because the marriage ensued the request of the defendant*.

And, in an action on the case, (c) in consideration that the plaintiff, at the request of the defendant, had taken such a one apprentice, the defendant undertook that he should serve truly, &c., it was adjudged that this was a good consideration, although it were passed, because it was at the request of the defendant. So, in consideration of one hundred and ten pounds given to a stranger, (d) at the instance of the defendant, the defendant undertook; and adjudged a good consideration, although it was passed, because it was at the instance of the defendant. And the distinction taken in these cases was agreed to by all the Justices in *Sidenham* and *Worlington's* case, (e) which was an action of *assumpsit*, wherein the plaintiff declared, that he, *at the request of the defendant*, was surety and bail for J. S., who was arrested into the *King's Bench* upon an action of 30*l.*, and that afterwards for the default of J. S. he was constrained to pay the 30*l.*; after which, the defendant, meeting with the plaintiff, promised him, for the same consideration, that he would repay that 30*l.*, but which he afterwards refused; and for the recovery thereof the action was brought. It was objected that this consideration could not maintain the action, because the consideration and promise did not concur and go together. *Anderson*, Ch. J. said, "This action will not lie; for it is but a bare agreement, and *nudum pactum*, because the contract was determined, and not in *esse* at the time of the promise; but he said, it is otherwise upon a consideration of marriage, for marriage is always a present consideration." *Windham* agreed with *Anderson*, and he put the case in 3 H. 7. If one selleth a horse unto another, and at another day he will warrant him to be sound of limb and member, it is a void warranty; for that such warranty ought to have been made or given at such time as the horse was sold: *Periam*, Justice, conceived that the action did well lie, and he said, "This case is not like unto the cases which have been put on the other side, for there is a great difference betwixt contracts and this case; for in contracts upon sale, the consideration, the promise, and the sale ought to meet together; for a contract is derived from *con* and *trahere*, which is a drawing together, so that in contracts every thing which is requisite ought to

(c) Hil. 36. *Eliz. Harris's* case. Dy.
272. a. n. 31.

(d) East. 38. *Eliz. Foster's* case. Dy.
272. a. n. 31.

(e) 2 Leon. 224.

concur and meet together, viz. the consideration on the one side, and the sale or promise on the other side. But to maintain an action upon an *assumpsit* the same is not requisite; for it is sufficient if there be a moving cause or consideration precedent, for which cause or consideration the promise was made; and such is the common practice at this day; for in an action on the case upon a promise, the declaration is laid that the defendant for and in consideration of 20*l.* to him paid, afterwards, that is to say, at a day after, *super se assumpsit*, and that is good, and yet there the consideration is laid to be executed. And he said that the case of *Hunt v. Bate*, would prove the present case; for in that case it was adjudged that the action would not lie, because the consideration was precedent to the promise, and because it was executed and determined long before. But it was holden by all the Justices, that if *Hunt* had requested *Bate* to have been surety or bail, and afterwards *Hunt* had made the promise upon that consideration, the same had been good; for that the consideration did precede, and was at the instance and request of the defendant."—*Rhodes*, Justice, agreed with *Periam*, and he said, "That if one serve me for a year, and hath nothing for his service, and afterwards, at the end of the year, I promise him 20*l.* for his good and faithful service ended, he may have and maintain an action upon the promise; for it is made upon a good consideration: but if a servant hath wages given him, and his master, *ex abundanti*, doth promise him 10*l.* after his service ended, he shall not maintain an action for the 10*l.*, because there is not any new cause or consideration preceding the promise; which difference was agreed by all the Justices: and afterwards, upon good and long advice and consideration had of the principal case, judgment was given for the plaintiff; and they much relied upon the case of *Hunt* and *Bate*.

And in the case of *Townsend v. Hunt*, (*f*) where the plaintiff, at the request of the defendant, had made a general release to him and his wife (she being executrix of F. T. under whose will the plaintiff claimed a legacy of 60*l.*, 53*l.* of which he had been paid, and had afterwards executed the release in question), the defendant in consideration thereof promised the plaintiff, that if his wife did not pay the seven pounds, residue of the legacy in her life-time, he would pay it after his wife's death: It was also holden, that though the promise was made after the release, yet, forasmuch as the release was made at the defendant's request, and the defendant had the benefit of it, the promise upon this consideration was good enough. So, also, in the case of *Bosden v. Sir John Thinn*, (*g*) where the plaintiff declared, that whereas the defendant requested the plaintiff to give his credit for two tuns of wine for one *Roberts*, to one *Fludd*, amounting to 50*l.*; he thereupon

(*f*) Cro. Car. 408.(*g*) Cro. Jac. 18. Yelv. 40.

gave his bond of 100*l.* for the payment of the 50*l.*, and for the non-payment thereof was sued, and enforced to pay 70*l.*; and showing this to the defendant, he, in consideration of the premises, assumed to the plaintiff to pay the 70*l.*, &c. — It was moved, that this promise was not sufficient, it being upon a consideration past. But the Court held, that the consideration and promise were valid; because *Roberts*, upon the plaintiff's undertaking at the defendant's request, had credit given him by *Fludd*; and the plaintiff was damnified by reason thereof, which in conscience the defendant ought to satisfy.

Where a party has derived a benefit from a past consideration, the law, in some instances, will raise an *implied request*; as where a man pays a sum of money, or buys any goods for me without my knowledge or request, and afterwards I agree to the payment, or receive the goods, this is equivalent to a previous request. *(h)* So, in consideration that the plaintiff had buried the defendant's son or wife, during the absence or separation of the father or husband; this is good without any previous request. *(i)*

7. OF PROMISES MADE UPON A CONSIDERATION EXECUTED IN PART AND CONTINUING.

If a consideration be executed in part only, and is continuing, it will support a subsequent promise. This was settled in the case of *Pearle v. Unger*, *(k)* which was an action of *assumpsit*, wherein the plaintiff declared, that he was possessed of certain lands for years, the defendant, in consideration he had occupied the land, and had paid the rent to the defendant, viz. 90*l.* *per annum*, all the time he had occupied it, assumed to save him harmless for the occupation of the land always during the term, as well for the years past as to come; and alleged that before the time of the promise, viz. such a day, &c. his beasts were taken *damage feasant*, &c., and that the defendant had not saved him harmless of it. It was moved in arrest of judgment, that there was no consideration to maintain the action; for the consideration and cause of the promise was a thing done before, viz. the occupation and payment of the rent; which being past, are no considerations for a thing future to be done. — But it was adjudged for the plaintiff; for the consideration, that he was in possession, and had paid his rent, and was to pay his rent, is sufficient to cause the other to defend his possession for the time past and to come. So, where one being possessed of a shop *(l)* agreed to demise it to another, paying to him 40*s.* by the year, and 10*s.* for the last quarter; and for the perfecting the agreement each gave the other 1*s.*,

(k) See 1 Saund. 264. n. 1.

(i) T. Raym. 260. Dy. 272. a. n. b.

(k) Cro. El. 94.

(l) Jones v. Clark, 2 Bulst. 73.

and afterwards, in consideration of the premises, the lessee promised to give the lessor 30*l.*, and assumed to pay it; in consideration whereof, and in performance of the contract, the lessor made a lease to the lessee accordingly; and the action was brought for the 30*l.*—It was objected, that there was no good consideration expressed to raise the promise for the 30*l.*, the same being grounded upon a consideration that was past, perfect, and executed, and so no good consideration. *Sed per curiam.* The lease here is made *after* the promise; the agreement is in performance of *all*, not of part; it was on the lessor's part to make the lease to the defendant, and on his part to pay the rent of 40*s.*; and the 30*l.* in consideration of his quietly enjoying the same, which is a *valid promise*, founded upon a good and sufficient consideration. And, in the case of *Warcop v. Morse*, (*m*) where the plaintiff declared, that in consideration he had bought of the defendant three parcels of land on such a day, the defendant afterwards on another day, promised to make him a sufficient assurance. It was adjudged that the consideration was not absolutely past, for the assurance was the substance of the sale. So, a promise on a consideration *executed* is good, if there were a duty before; as, where the plaintiff declared that on such a day, the defendant was indebted to him in a certain sum, for divers goods sold to him; and for money lent; and also for money due upon an account stated; and being so indebted, the defendant in consideration thereof afterwards, on such a day promised to pay, &c. It was holden, that this is a good consideration to raise an *assumpsit*; for the continuance of the debt is a consideration continuing and sufficient to support an action. (*n*)

8. OF A PROMISE TO PAY A PRECEDENT DEBT BARRED BY STATUTE, &c.

Where a man is under a moral obligation, which no court of law or equity can enforce, and *promises*, the honesty and rectitude of the thing is a valid consideration: As, if a man promise to pay a just debt, the recovery of which is barred by the statute of limitations; (*o*) or, if a man after he comes of age, (*p*) promises to pay a meritorious debt contracted during his minority, but not for necessities; or if a bankrupt, in affluent circumstances after his certificate, promises to pay the whole of his debts; (*q*) or if a man promise to perform a secret trust, or a trust void for want of writing by the statute of frauds. (*r*) In these, and in many other instances, though the promise gives a compulsory remedy where there was none before either in law or equity, yet as the promise is

(*m*) Cro.EL.138.

(*n*) *Hodge v. Parison*, 1 Rol. Rep. 413.

Jackson v. Astell, 1 Lev. 198. Mo. 854.

(*o*) 1 Ld. Raym. 589.

(*p*) Stra. 690. 1 Term Rep. 648.

(*q*) Cowp. 544. Doug. 101. n.

(*r*) Cowp. 290.

only to do what an honest man ought to do, the ties of conscience upon an upright man are a sufficient consideration. (s) A subsequent promise, however, will revive that which is *voidable* only; therefore where the consideration is *void* in its creation, no promise can set it up again: As, if all the creditors of an insolvent consent to accept a composition for their demands, on an assignment of his effects by a deed of trust, to which they are all parties, and one of them, before he executes, obtain from the insolvent a promissory note for the residue of his demand, as the condition of his executing the deed, the note is void in law, as a fraud on the rest of the creditors; and a subsequent promise to pay it is a promise without consideration, and will not maintain an action. (t)

9. OF A CONSIDERATION VOID IN PART.

If a contract or agreement be made upon two considerations, and one of them cannot be performed, this will not avoid the contract; and in an action thereon, the damages shall be intended to be wholly given for the good consideration. (u) As, in consideration of the assignment of a title to dower, and the not suing an attachment out of chancery upon a decree; though a title to dower cannot be assigned, but released to the *terre-tenant*. (v) So, in consideration of a permission to remove goods, and relinquish a foreign attachment, though it cannot be relinquished. (w) Or, in consideration of two things; and one of them is insufficient; as, in consideration of forbearance of a debt due from the defendant and his son; though, as to the debt of the son, it is of no value. (x) And the void consideration need not be proved. (y) But if one of the considerations is found false by the jury, the action fails. (z) Or, if one of the considerations is unlawful, that vitiates the whole, and the plaintiff shall recover for nothing; as, in consideration of 2s., and the escape of R.; for the permitting the escape is unlawful. (a)

10. OF A CONSIDERATION FROM A THIRD PERSON.

A promise in some cases is valid though the consideration on which it is made proceed in part from another; as, if a man promise a pig of lead to A., and his executor give lead for that purpose to B. who undertakes to deliver it to A.; an action lies by A. against B. upon his undertak-

(s) Per Lord Mansfield, Cowp. 290. See also 2 Bl. Com. 445. and 5 Taun. Rep. 47.

(t) *Cockshott v. Bennett*, 2 Term Rep. 763.

(u) Cro. El. 149. 1 Sid. 38. contra. 4 Leon. 3.

(v) Cro. El. 847.

(w) Yelv. 56.

(x) 1 Sid. 38.

(y) Com. Dig. Action upon Assumpsit, B. 13.

(z) Cro. El. 848.

(a) Cro. El. 199. See also 1 Sid. 38.

ing. (b) So, in the case of *Dutton* and wife v. *Pool*, (c) the plaintiff declared, that his wife's father being seised of certain lands now descended to the defendant, and being about to cut down 1000*l.* worth of timber off from the said lands to raise a portion for his daughter, the defendant, being his heir, promised the father, in consideration that he would forbear to fell the timber, that he would pay the daughter 1000*l.* After verdict for the plaintiff, upon *non assumpsit*, it was moved in arrest of judgment, that the action ought not to have been brought by the daughter, but by the father; or if the father were dead, by his executors, for the promise was made to the father, and the daughter was neither privy nor interested in the consideration, nothing being due to her: but *Scroggs*, Ch. J. said, that there was such apparent consideration of affection from the father to his children, for whom nature obliged him to provide, that the consideration and promise to the father might well extend to the children. Judgment for the plaintiff; for the son had the benefit by having the wood, and the daughter had lost her portion by these means. But, in general, it is necessary that the consideration on which the promise is founded should move from the party in whose favour the promise is made. Thus, in the case of *Bourne* v. *Mason*, (d) where the plaintiff declared, that A. being indebted to the plaintiff and defendant in two several sums of money, and B. being indebted to A. in another sum, and there being a communication between the parties, the defendant in consideration that A. would permit the defendant to sue B. in A.'s name for the recovery of the sum due from B. to A. promised that he, the defendant, would pay A.'s debt to the plaintiff, and alleged that A. permitted the defendant to sue accordingly, and that he recovered. After verdict for the plaintiff, upon *non assumpsit*, it was moved in arrest of judgment, that the plaintiff could not maintain this action: and of this opinion were the court, observing, that the plaintiff was a mere stranger to the consideration, having done nothing of trouble to himself, or of benefit to the defendant. And in the case of *Crow* v. *Rogers*, (e) where the plaintiff declared, that J. S. was indebted to the plaintiff, and it was agreed between J. S. and the defendant, that the defendant should pay to the plaintiff the debt due to him from J. S., and that J. S. should make the defendant a title to a house, in consideration whereof the defendant promised to pay to the plaintiff the debt due to him from J. S., and then averred that J. S. was always ready to perform his part of the agreement: on demurrer, judgment was given for the defendant, because the plaintiff was a stranger to the consideration.

(b) 1 Rol. Abr. 27. l. 40. 31. l. 5.

(c) 2 Lev. 210.

(d) 1 Vent. 6.

(e) Stra. 592. See also 1 Bos. & Pul. 101. n. c. 3 Bos. & Pul. 149. n. a.

11. OF A CONSIDERATION WHICH THE PARTY
HAS NOT THE POWER TO GRANT.

The consideration must be such as the party, to whom a promise is made, has a power by law to perform, or cause to be performed, otherwise the promise cannot be enforced. Thus, in the case of *Harvey v. Gibbons* (*f*) the plaintiff declared, that he being bailiff to J. S., the defendant in consideration that the plaintiff would discharge defendant of a debt due to J. S., promised, &c. After verdict and judgment for the plaintiff in the court below, it was reversed in B. R., because the plaintiff could not discharge a debt due to his master. And the principle established by this case was recognized by Lord *Kenyon*, Ch. J. in the case of *Nerot v. Wallace*, (*g*) where the consideration was, that the plaintiffs, who were assignees under a commission of bankrupt against J. S. would forbear to proceed to have the examination of J. S. taken before the commissioners concerning certain sums, with which J. S. was charged, and that the commissioners would forbear and desist accordingly. Lord *Kenyon* said, "The ground on which I found my judgment is this; that every person who, in consideration of some advantage either to himself or another, promises a benefit, must have the power of conferring it up to the extent to which the benefit professes to go; and that not only in fact, but law." Now the promise made by the assignees in this case, which was the consideration of the defendant's promise, was not in their power to perform; because the commissioners had nevertheless a right to examine the bankrupt. And no collusion of the assignees could deprive the creditors of the right of examination which the commissioners would procure them. The assignees stipulated not only for their own acts, but also that the commissioners should forbear to examine the bankrupt; but clearly they had no right to tie up the hands of the commissioners by any such agreement. And if any proposal of that sort had been made to the commissioners, they, as acting in a public duty, would have been guilty of a breach of that duty in acceding to it.

(*f*) 2 Lev. 161.

(*g*) 5 Term Rep. 22.

CHAPTER II.

1. OF THE CONSTRUCTION OF CONTRACTS AND AGREEMENTS.

HAVING in the former Chapter treated of the general nature and parts of a contract and promise, I propose in the present Chapter to show, first, the general rule adopted in the construction of contracts and agreements; secondly, what shall be deemed a penalty or stipulated damages for securing the performance of a contract; thirdly, the power of the parties to cancel or rescind a contract or agreement; and, lastly, the general rules to be observed with regard to the performance of a contract.

The general rule adopted in our courts of law and equity, in the construction of a contract or agreement is, that it shall be construed according to its sense and meaning, as collected, in the first place, from the terms used in it, which terms are themselves to be understood in their plain, ordinary, and popular sense, unless they have generally, in respect to the subject matter, as by the known usage of trade, or the like, acquired a peculiar sense, distinct from the popular sense of the same words; or unless the context evidently points out that they must, in the particular instance, and in order to effectuate the immediate intention of the parties to that contract, be understood in some other special and peculiar sense. (a) So, with regard to mercantile instruments, the rule is, that the construction should be liberal, agreeable to the real intention of the parties, and conformable to the usage of trade in general, and of the particular trade to which the contract relates. (b)

Pothier, in his very learned treatise on obligations, (c) lays down the following (amongst other) rules for the interpretation of agreements; 1. We ought to examine what was the common intention of the contracting parties, rather than the grammatical sense of the terms. (d) 2. When a clause is capable of two significations, it should be understood in that which will have some operation, rather than that in which it will have none. (e) 3. Where the terms of a contract are capable of two significations, we ought to understand them in the sense which is most agreeable to the nature of the contract. (f) 4. Any thing which may appear ambiguous in the terms of a contract, may be explained by the

(a) Per Lord *Ellenborough*, 4 East Rep. 155.

(b) Doug. 277.

(c) Part 1. c. 1. s. 1. art. 7. Evans's edition.

(d) See also 5 Vin. Abr. 510. Cowp. 600. 1 Term Rep. 703.

(e) Co. Lit. 42. a. Cowp. 714.

(f) Doug. 72, 3. 2 Bos. & Pul. 565. 5 Vin. Abr. 510.

common use of those terms in the country where it is made. (g) 5. Usage is of so much authority in the interpretation of agreements, that a contract is understood to contain the customary clauses, although they are not expressed. (h) 6. We ought to interpret one clause by the others contained in the same act, whether they precede or follow it. 8. However general the terms may be in which an agreement is conceived, it only comprises those things respecting which it appears that the contracting parties proposed to contract, and not others which they never thought of. 10. When a case is expressed in a contract, on account of any doubt which there may be whether the engagement resulting from the contract would extend to such case, the parties are not thereby understood to restrain the extent which the engagement has of right, in respect to all cases not expressed. 11. In contracts, as well as in testaments, a clause conceived in the plural may be frequently distributed into several particular clauses. 12. What is at the end of a phrase, commonly refers to the whole phrase, and not only to what immediately precedes it, provided it agrees in gender and number with the whole phrase. Now these rules claim our particular attention, not only on account of the high estimation in which the opinions of *Pothier* are always received, (*) but because these rules will be found to be quite consonant to the principles of the English law, and to the practice of our courts, in the construction of contracts and agreements, upon examining the authorities which I have already cited at the end of the different rules, and to a few others which I shall now lay before the reader.

In *Plowden's Commentaries*, (i) it is said " That if any persons are agreed upon a thing, and words are expressed or written to make the agreement, although they are not apt and usual words, yet if they have substance in them tending to the effect proposed, the law will take them to be of the same effect as usual words; for the law always regards the intention of the parties, and will apply the words to that which, in common presumption, may be given to be their intent. And such laws are very commendable: for if the law should be so precise as always to insist upon a peculiar form and order of words in agreements, and would not regard the intention of the parties, when it was expressed in other words of substance, but would rather apply the intention of the parties to the order and form of words, than the words to the intention of the parties, such law would be more full of form than of substance. But our law, which is the most reasonable law upon earth, regards the effect and substance of words more than the form of them, and takes the substance of words to imply the form thereof, rather than that the intent of the parties should be void: and the law

(g) 5 Vin. Abr. 511. 1 Bl. Rep. 258.
6 Term Rep. 338.

(h) 8 Bro. P. C. 541. Doug. 201.

(*) Vide Sir W. Jones Law of Bailments, p. 29. &c.

(i) Fo. 140. 290.

takes words of substance that are rarely used, to be equivalent to words of substance that are usual." So, in contracts it is not material which of the parties speak the words, if the other agrees to them; for the agreement of the minds of the parties is the only thing the law respects in contracts; and such words as express the assent of the parties, and have substance in them, are sufficient. (k) And *Willes*, Ch. J. in the case of *Packhurst v. Smith*, (l) observes, "it is a known maxim in law, that '*benignæ faciendæ sunt interpretationes chartarum ut res magis valeat quam periat.*'" There is also another, that, "*verba intentioni et non e contrà debent inservire.*" His lordship also further observes, "That it is said in our books that the construction of deeds ought to be favourable, and as near to the apparent intent of the parties as possibly may be, and as the law will permit; that too much regard is not to be had to the natural and proper signification of words and sentences to prevent the simple intention of the parties from taking effect; for that the law is not nice in grants, and therefore it doth often transpose words contrary to their order, to bring them to the intent of the parties; for neither false *Latin* nor false *English* will make a deed void, if the intent of the parties doth plainly appear. I have collected these rules and maxims from *Littleton*, *Plowden*, *Coke*, *Hobart*, and *Finch*, persons of the greatest authority. But they are themselves so full of justice, and good sense, that they do not want any authority to support them, and I do not know that they were ever yet controverted. On the foundation of these rules, whenever it is necessary to give an opinion upon the doubtful words of a deed, the first thing we ought to enquire into, is, what was the intention of the parties. If the intent be as doubtful as the words, it will be of no assistance at all. But if the intent of the parties be plain and clear, we ought, if possible, to put such a construction on the doubtful words of a deed as will best answer the intention of the parties, and reject that construction which manifestly intends to overturn and destroy it. I admit that though the intent of the parties be never so clear, it cannot take place contrary to the rules of law, nor can we put words in a deed which are not there; nor put a construction on the words of a deed directly contrary to the plain sense of them. But where the intent is plain and manifest, and the words doubtful and obscure, it is the duty of the judges to endeavour to find out such a meaning in the words as will best answer the intent of the parties." And Lord Ch. B. *Comyns* in his Digest (m) also states, "That an agreement or contract shall have a reasonable construction, according to the intent of the parties; as, if a man agree with B. for twenty barrels of ale, he shall not have the barrels after the ale is spent." So, if a man promise pay-

(k) *Ibid.* Fo. 140.(m) *Tit. Agreement, C. et tit. Parols.*(l) *Willes Rep.* 352. *Shep. Touch.* c. 5.
p. 86.

ment without saying to whom, it shall be intended to him from whom the consideration comes. (n) And upon a promise of payment *according to the rate of 40s. per ton*, it shall be intended that he will pay for the odd pounds according to the same rate. (o) Again, if one promise payment upon *Easter-day*, if *A.* do not pay the same day, *A.* has all the day for payment; and therefore it shall be intended of a payment afterwards upon request. (p) *Pothier's* seventh rule of construction is, that in case of doubt, a clause ought to be interpreted against the person who stipulates any thing, and in discharge of the person who contracts the obligation. But the rule of construction adopted by our courts of law is quite the reverse; namely, that in case of doubt, the words of a promise, or covenant, shall be taken most strongly against the promisor or covenantor. (q) Lord *Bacon*, however, in commenting upon this general maxim, says, "It is to be noted that this is the last rule to be resorted to, and is never to be relied upon but where all other rules of exposition of words fail; and if any other rule come in place, this giveth place;" and adds, "that it is a point worthy to be observed generally of the rules of law, that when they encounter and cross one another, that be understood which the law holds to be worthier and to be preferred; and it is in this particular very notable to consider, that this being a rule of some strictness and rigour, doth not as it were its office, but in the absence of other rules which are of some equity and humanity." Lord *Eldon* also, in a very recent case, observes, (r) "It is certainly true that the words of a covenant are to be taken most strongly against the covenantor; but that must be qualified by the observation, that a due regard must be paid to the intention of the parties, as collected from the whole context of the instrument." Though the rule of construction of agreements is the same in a court of equity as in a court of law, yet the consideration of performance differs; for at law a covenant and agreement must be strictly and literally performed; but in equity it is sufficient if it be really and substantially performed according to the true intent and meaning of the parties, so far as circumstances will admit.*

The *executors* and *administrators* of the contracting parties are generally comprehended in every contract though not mentioned, (s) but the heir is not bound unless expressly named. (t) We have just seen (*) that where the language and terms of a contract appears doubtful in their construction, it may be explained by the common use of those terms in the country or place where it is made, and not where the action is brought: (v) But such a mode of construction cannot be

(n) Cro. El. 149. 848. Poph. 182. Noy.

83.

(o) Yelv. 134.

(p) 1 Rol. Abr. 15. l. 45.

(q) Co. Lit. 182. a.

(r) 2 Bos. & Pul. 22.

(*) Vide 3 Ves. jun. 692.

(s) Com. Dig. tit. Covenant. c. 1.

(t) Bac. Abr. tit. Heir. F.

(*) Ante, 25, 24.

(v) 1 Bl. Rep. 258.

adopted in any case where it would militate against any general rule of law; as, where corn is sold at a fixed price per bushel, evidence that either a customary measure, or some other than the *Winchester* measure was intended, is inadmissible; this being the general standard measure of the country established by act of parliament. (u) And though it be usual that mercantile contracts should be construed conformably to the usage and custom of merchants, yet evidence of usage is not admissible to controul or contradict the plain unequivocal language of a contract or agreement. Thus, where A. agreed to sell to B. a quantity of bacon, which he warranted to be of a particular quality, and upon delivery at the wharf B. weighed and examined part of the bacon, and paid for the whole by a bill at two months; but before the bill became due, it turned out, on further examination, that the bacon was not agreeable to the contract, and he gave notice thereof to A. It was determined, that A. could not give in evidence a custom in the bacon trade, that the buyer was bound to reject the contract if dissatisfied therewith at the time of his first examining the commodity; and that having neglected to do so, in the first instance, he was excluded from future objections. (w)

Upon a contract where the quantity and quality of an article are not mentioned, the previous dealings of the parties, or other circumstances, may be called in aid to give effect to the contract, and to explain the intention of the parties, provided such evidence does not controul the legal sense of the terms of the contract; as, if two men should bargain for wheat without mentioning the quantity or sort, it would be an imperfect bargain; but if, by their former dealings, it appeared that wheat of a particular kind, and of a certain quantity had been usually delivered, the contract or bargain may be construed conformably to such previous dealings; but the subsequent acts or dealings of the contracting parties cannot be allowed to controul or explain their original mode of dealing and intention. (x) Upon an agreement made in *London*, to pay 100*l.* in *Dublin*, payment in *Irish* currency shall be presumed. (y) So, if the value of any article is stipulated in a contract, such value shall be intended to be the value at the time when the contract is to take effect, and not at the time of making it; as, if one agrees to pay at such a day five quarters of wheat, and on the day of the contract they were worth 50*l.*, but on the day of payment only 5*l.*; the party to whom the promise was made would be entitled to receive either the wheat or the 5*l.*, but no more. (z)

In some cases the natural and ordinary import of words may be restrained, if such an interpretation would render the agreement wholly

(u) Vide 4 T. R. 514. 6 T. R. 338.

(x) 1 Powell on Contracts. 384.

(w) *Yeates v. Pitt*, 11olt Ca. Nl. Pri.

(y) Davis Rep. 28.

95. 2 Marsh. Rep. 141. See also Phillipps

(z) Dy. Rep. 82. b.

on Evid. c. 10. s. 2.

inoperative, and be manifestly repugnant to the real intention of the parties; as, where a man gave his promissory note, in which he expressed the consideration to be for money previously borrowed and received, and then added these words, "which I promise never to pay;" the word "never" may be rejected. (a) Again, where a particular construction would lead to consequences ruinous to the contractor, and such as no rational or prudent man could be presumed to have contemplated, and a different mode of construction may be made without doing violence to the terms of the contract; such an interpretation may, it is presumed, be given.

Though it be a general rule of law, that parol evidence cannot be admitted to contradict, add to, or vary the terms of any written instrument; (b) yet consistently with this rule parol evidence is admissible to show, that after the making of the agreement, the parties entered into some new stipulation, or agreed to extend the time of performance; as in the case of a contract to deliver bacon on particular days, parol evidence of a subsequent agreement as to the extension of the time of the delivery of the bacon is admissible. (c) So, parol evidence will be allowed to explain an indefinite or immaterial expression, or the intention of the parties when not clearly apparent on the face of the instrument, provided the evidence is not inconsistent therewith. (d) And parol evidence is also admissible to contradict the terms and circumstances under which a contract was entered into, though contrary to what is expressed in the instrument, in all cases where the consideration has been illegal; as for simony, usury, compounding of felony, &c. (e) And where fraud is imputed, the party who complains of the fraud may prove any circumstance, however contrary to the statement in the instrument, to shew the fraudulent nature of the transaction; unless indeed where both parties are in *pari delicto*, and one is endeavouring to enforce the contract against the other; in which case both the parties shall be estopped from contradicting the express terms of the agreement. (f)

2. OF CONTRACTS OR AGREEMENTS WITH A PENALTY OR STIPULATED DAMAGES.

A penalty is a forfeiture annexed to a contract or agreement, either for the better enforcing a prohibition, or by way of security for the doing of some collateral act agreed upon between the contracting parties.

Stipulated damages can only be where there is a clear unequivocal agreement, which stipulates for the payment of a certain sum, as a li-

(a) Vide 2 Atk. 32.

(b) Phil. on Evid. c. 10. s. 2.

(c) 1 M. & S. 21.

(d) 8 T.R. 382. 384.

(e) Bul. Ni. Pri. 173. 2 Wils. 547.

(f) 2 B. & A. 370.

quidated satisfaction fixed and agreed upon by the parties, for the doing or not doing certain acts particularly expressed in the agreement.

It is said, in the case of *Astley v. Weldon*, (g) that where the payment of a smaller sum is secured by a larger, it must always be considered as a penalty, and not as liquidated damages. So, where articles contain covenants for the performance of several things, and then one large sum is stated at the end to be paid on breach of performance, that must be considered as a penalty. (h) So, where a doubt is stated whether the sum inserted be intended as a penalty or not, if a certain damage less than that sum is made payable upon the face of the same instrument, in case the act intended to be prohibited be done, that sum shall be construed to be a penalty. (i) But, where it is agreed that if a party do such a particular thing, such a sum shall be paid by him, there the sum stated may be treated as liquidated damages. (k) In one case (l) it was said by Lord *Loughborough*, "That an agreement for liquidated damages can only be where there is an engagement for the performance of certain acts, the not doing of which would be an injury to one of the parties; or to guard against the performance of acts, which, if done, would also be injurious. In such cases an estimate of the damages may be made by a jury, or by a previous agreement between the parties, who may foresee the consequences of a breach of the engagement, and stipulate accordingly."

From these general observations, and an attentive consideration of the following cases, the reader will distinguish between those where a penalty is intended as a security for a collateral object, and those in which the contract itself has assessed the damages, which the party is absolutely to pay upon his doing or omitting to do what he has promised. Thus, in the case of *Roy v. the Duke of Beaufort*, (m) where the plaintiff was jointly bound with his son in a bond, in the penalty of 100*l.*, that the son should not commit any trespass in the defendant's royalty, by shooting, hunting, fishing, &c., Lord *Hardwicke* said, "I am of opinion, that when these sort of bonds are given by way of stated damages between the parties, it is unreasonable to imagine they could only be intended as a bare security that the obligor should not offend for the future. Was this the case, in what respect was a gentleman in a better condition who has such a bond than he was before, if after he has obtained judgment at law, a court will give him no other satisfaction than the bare value of the price of the game that is killed?" So, in the case of *Rolfe v. Peterson*, (n) it was determined, that where a lessee covenants that in case any part or parcel of the ancient meadow or pasture ground,

(g) *Per Chambre J.* 2 Bos. & Pul. 354.

(h) *Per Heath J.* Ibid. 353.

(i) *Per Lord Eldon*, Ibid. 350.

(k) *Per Heath J.* Ibid. 353.

(l) *Orr v. Churchill*, 1 H. Bl. 232.

(m) 2 Atk. 190.

(n) 2 Bro. P. C. 436. See also *Ponsonby v. Adams*, 2 Bro. P. C. 431. S. P.

or any other part of the premises that had not been in tillage within the last twenty years from the time of making the lease, should, during the continuance of the term, be dug up, ploughed or converted into tillage, he shall pay the further yearly rent or sum of 5*l.* for every acre so to be broke up or converted into tillage; this increased rent is not to be considered as a penalty, but as a liquidated satisfaction fixed and agreed upon between the parties. And therefore if an action is brought for recovering it, a court of equity will not interpose, or give any relief.

So, in the case of *Lowe v. Peers*, (o) which was an action upon a marriage-contract to the effect following: "I do hereby promise Mrs. Catherine Lowe, that I will not marry with any person besides herself: If I do, I agree to pay to the said Catherine Lowe 1000*l.* within three months next after I shall marry any body else. Witness my hand and seal, *Newsham Peers*." This deed was executed in 1757. And in 1767, *Peers* married another woman; whereupon this action was brought; and at the trial, the jury found a verdict for the plaintiff, 1000*l.* damages. But a question was raised for the opinion of the Court, whether the 1000*l.*, mentioned in the deed was inserted as a penalty, or as liquidated damages. And the Court determined, that the deed itself liquidated the *certain sum*: it was ascertained and fixed between the parties themselves; and was therefore the true and proper quantum of the damages. Lord *Mansfield* said, "The money was payable upon a contingency which has happened; and therefore it ought to be paid. There is a difference between covenants in general, and covenants secured by a penalty or forfeiture: In the latter case, the obligee has his election: he may either bring an action of *debt* for the penalty, and recover the penalty, (after which recovery of the penalty, he cannot resort to the covenant; because the penalty is to be a satisfaction for the whole) or, if he does not choose to go for the penalty, he may proceed upon the covenant, and recover more or less than the penalty, *toties quoties*. And upon this distinction they proceed in courts of equity. They will relieve against a penalty upon a compensation: but where the covenant is to pay a particular liquidated sum, a court of equity cannot make a new covenant for a man, nor is there any room for compensation or relief. As, in leases containing a covenant against ploughing up meadow; if the covenant be, 'not to plough,' and there be a penalty, a court of equity will relieve against the penalty, or will even go further than that to preserve the substance of the agreement: but if it is worded 'to pay 5*l.* an acre for every acre ploughed up;' there is no alternative, no room for any relief against it; no compensation; it is the substance of the agreement. Here the specified sum of 1000*l.* is found in damages: it is the particular liquidated sum fixed and agreed

(o) 4 Burr. 2225.

upon between the parties; and is therefore the proper quantum of the damages."

So, in the case of *Fletcher v. Dyche*, (p) which was an action of *assumpsit* for work and labour, and goods sold and delivered. The defendant pleaded a set-off for money due upon a bond, with a condition reciting, that the plaintiff had contracted and agreed with the defendant that he would perform and execute all the smith and ironmonger's work to be done and performed in and about the repairs of the parish church of *St. Mary-le-Bow*, and which were mentioned and expressed in the said particular plan or estimate, and in the manner therein directed to be done, and find and provide all the materials for the doing thereof, within the time or space of six weeks from the day of the date of the said writing obligatory, at and for the price or sum of 118*l.* 18*s.*, which was agreed to be paid in three months after the said parish church should be completely repaired; and had agreed that if he should not have done and performed the said smith and ironmonger's work within the time thereinbefore mentioned to have been agreed upon and limited for the doing thereof, he would forfeit and pay to the defendant the sum of 10*l.* for every week after the expiration of the time agreed upon and limited for the doing thereof, until the said smith's and ironmonger's work should be completely finished. The plea then stated that the defendant did not, within the said space of six weeks from the day of the date of the said writing obligatory, perform or execute all the smith and ironmonger's work, &c., but suffered and permitted the same to remain unfinished for the space of four weeks next after the expiration of the time agreed upon for the doing thereof, whereby the plaintiff became liable to pay to the defendant the sum of 40*l.*, being at and after the rate of 10*l.* for each and every week of the said four weeks; and the sum of 40*l.*, and every part thereof, at the time of the commencement of this suit, was justly due and owing from the plaintiff to the defendant, upon and by virtue of the said writing obligatory and the condition thereof. To this plea there was a general demurrer, and joinder in demurrer. And the objection upon the demurrer to the plea was, that the weekly payments were in the nature of a penalty, and not as stipulated damages; and therefore could not be the subject of a set-off. But the Court overruled this objection, and determined that the weekly payments were not penalties, but in the nature of liquidated damages, and might be set off against the plaintiff's demand. *Ashhurst* Just. said, "The sums set off are in the nature of liquidated damages, and are such a kind of penalty, if they may be called by that name, as a court of equity would not relieve against. The object of the parties in naming this weekly sum, was to prevent any

altercation with respect to the quantum of damages which the defendant might sustain by reason of non-performance of the contract. It would have been difficult for the jury to have ascertained what damages the defendant had really suffered by the breach of the agreement; and therefore it was proper for the contracting parties to ascertain it by their agreement: So that this is a case of stipulated damages; and it is not to be considered as a penalty." And *Buller J.* said, "The principal question to be considered is, whether this is in the nature of liquidated damages or a penalty. When there is a penalty in the bond, it is strange that the sum mentioned in the condition should be called a penalty; I do not know how there can be an equitable and a legal penalty. But this is as strongly a case of liquidated damages as can possibly exist, and is like the case of demurrage. In either case it is impossible to ascertain precisely what damages the party has really sustained; and therefore the contracting parties agree to pay a stipulated sum."

So, in the case of *Barton v. Glover*, (*q*) which was an action of *assumpsit*; and at the trial it appeared that the plaintiff and defendant were coach proprietors at *Croydon*, and on the 2d of *April*, 1815, they entered into an agreement, the substance of which was, that in consideration that *Barton* would pay to the defendant the sum of 175*l.*, the defendant would withdraw his stage-coach from the road, and not engage or concern himself in driving any other stage-coach on the road from *Croydon* to *London*; and the following was the clause in the agreement upon which the question arose: "And for the due and punctual performance of this agreement, each of the said parties to these presents does hereby agree to bind himself to the other of them in the sum of 500*l.*, to be considered and taken as liquidated damages, or sum of money forfeited or due from the one party to the other who shall neglect or refuse to perform his part of the agreement." It was contended by the defendant's counsel, that this ought to be taken as a penalty, and not as liquidated damages. But *Gibbs C. J.* said, "There are a great many cases in which stipulated damages are contracted for, but in which neither courts of law nor equity will permit the parties to recover them. In *Astley v. Weldon* (*r*) there was no stipulation that the damages should be liquidated; and in that case there were several minor fines, which repudiated the idea that the whole penalty should be due for every breach. But in the present case, unless the damages are to be considered as liquidated, and definitively ascertained by the parties themselves, the clause in the agreement means nothing."

But in the case of *Errington v. Aynesly*, (*s*) where a bond was entered into in the penal sum of 9000*l.* for the performance of covenants to build a bridge for 6000*l.*, and the materials valued at 3000*l.*, and to sup-

(*q*) Holt N.P. Cas. 43. Man. Index, tit. Penalty, last edit.

(*r*) Ante, 29.

(*s*) 2 Bro. Ch. Cas. 341.

port the bridge for seven years; the 6000*l.* was actually paid, and the bridge was built, but thrown down by a flood a year afterwards. An action was brought upon the bond; but an injunction was granted, and an issue of *quantum damnificatus* ordered; the sum mentioned in the bond being considered as a penalty, and not as a liquidated sum.

And in the case of *Sloman v. Walter*, (t) where the plaintiff and defendant were partners in the *Chapter Coffee-house*, and upon entering into the partnership it had been agreed that the business should be conducted entirely by the plaintiff, but that the defendant should have the use of a particular room in the house whenever he thought proper. And in order to enforce this agreement, a bond was entered into by the plaintiff to the defendant in the penalty of 500*l.* After some time the defendant demanded the use of the room, and being refused, brought an action for the penalty of the bond. The plaintiff filed this bill, praying an issue to try *quantum damnificatus*, and an injunction in the mean while. Lord *Thurlow* Ch. said, "The only question was, whether this was to be considered as a penalty, or as assessed damages. The rule that where a penalty is inserted merely to secure the enjoyment of a collateral object, the enjoyment of the object is considered as the principal intent of the deed, and the penalty as only accessional, and therefore only to secure the damage really incurred, is too strongly established in equity to be shaken. This case is to be considered in that light. The injunction must be continued till the hearing.

The reporter adds, "That the same had been done in a case of *Hardy v. Martin*, 7th May, 1783, (u) where the plaintiff and defendant had been partners as brandy merchants; on plaintiff's quitting the business, and selling the lease and good will of the shop to the defendant for 300*l.*, he entered into bond in 600*l.* penalty not to sell for nineteen years, any quantity of brandy less than six gallons, within the cities of *London* and *Westminster*, or five miles thereof, or to permit any person so to do in his name, &c. Upon a breach, action brought, and a verdict for the penalty, plaintiff filed this bill, praying that an account might be taken of the actual damage sustained by the defendant, and an issue directed for that purpose; and that on payment of the damages defendant might be restrained from taking out execution for the penalty of the bond. Upon motion to dissolve the injunction, and cause shown, the rule was discharged.

So, in the case of *Astley v. Weldon*, (v) which was an action upon a special agreement, whereby the defendant, in consideration of a certain weekly salary, agreed with the plaintiff, amongst other things, that

(t) 1 Bro. Ch. C. 418.

(v) 2 Bos. & Pul. 346.

(u) Since reported in 1 Cox Rep. 26.

she, the said defendant, would, during the term of three years, at the usual and accustomed hours in each day, perform at the plaintiff's theatre, in the several public performances to be from time to time exhibited on the stage of the theatre, when and as often as she should be required; and likewise further agreed to attend all rehearsals at the theatre; and also that she would, on every night's public performance, be at the theatre, at least one half-hour before the public performance should begin. "And lastly it was agreed on, by and between the said parties, that either of them neglecting to perform that agreement, according to the tenor and effect and the true intent and meaning thereof, should pay to the other of them the full sum of 200*l.* of lawful money of Great Britain, to be recovered in any of His Majesty's courts of record at Westminster."

The Court, after argument, held, that the sum mentioned in the agreement was in the nature of a penalty, and not of liquidated damages: and Lord Eldon Ch. J. in giving his opinion on this case took a very luminous review of the cases which had been determined on this subject, and the principle upon which they were governed. His Lordship observed, "That when the cause came before me, at *nisi prius*, I felt, as I have often done before in considering the various cases on this head, much embarrassed in ascertaining the principle on which those cases were founded; but it appeared to me that the articles in this place furnished a more satisfactory ground for determining whether the sum of money therein mentioned ought to be considered in the nature of a penalty, or of liquidated damages, than most others which I had met with. What was urged in the course of the argument has ever appeared to me to be the clearest principle, viz. that where a doubt is stated whether the sum inserted be intended as a penalty or not, if a certain damage less than that sum is made payable upon the face of the same instrument, in case the act intended to be prohibited be done, that sum shall be construed to be a penalty. The case of *Sloman v. Walter* did not stand in need of this principle; for there, by the very form of the instrument, the sum appeared to be a penalty; in which case a court of equity could never consider it as liquidated damages, but must direct an issue of *quantum damnificatus*. A principle has been said to have been stated, in several cases, the adoption of which one cannot but lament, namely, that if the sum would be very enormous and excessive, considered as liquidated damages, it shall be taken to be a penalty, though agreed to be paid in the form of contract. This has been said to have been stated in *Rolfe v. Paterson*, where the tenant was restrained from stubbing up timber. But nothing can be more obvious than that a person may set an extraordinary value upon a particular piece of land, or wood, on account of the amusement which it may afford him. In this country, a man has a right to secure to himself a property in his amusements; and if he

chooses to stipulate for 5*l.* or 50*l.* additional rent upon every acre of furze broken up, or for any given sum of money upon every load of wood cut and stubbed up, I see nothing irrational in such a contract; and it appears to me extremely difficult to apply, with propriety, the word 'excessive' to the terms in which parties choose to contract with each other. There is, indeed, a class of cases, in which courts of equity have rescinded contracts on the ground of their being unequal. It has been held, however, that mere inequality is not a ground of relief. The inequality must be so gross that a man would start at the bare mention of it. Necessity, in these cases, seems to have obliged the courts to admit a principle nearly as loose as that to which I have before alluded. But with respect to the case of *Ponsonby v. Adams*, the landlord may have set a value upon the residence of a particular tenant on his estate; and why should he not upon that ground have stipulated, that if such tenant should cease to reside there, his rent should rise to 150*l.*? Both in *Rolfe v. Peterson*, and *Ponsonby v. Adams*, I should have said, that what was matter of contract, bottomed on a good consideration, should not be looked upon as a penalty, but should be considered as rent reserved, or liquidated damages. In *Lowe v. Peers*, it is quite clear that the breach of promise of marriage was to be compensated for in damages. It was a contract, that in case the party failed to perform his promise, he should pay the sum of 1000*l.* The case of *Fletcher v. Dyche*, is very strongly to the present purpose. In that case, a bond in a penal sum was conditioned to perform certain work within a certain time, or to pay 10*l.* for every week beyond that time. The 10*l.* per week was secured by the penalty of the bond; and to have said that one term of a contract, secured by a penal sum, should also be a penal sum, would have been absurd. Indeed, Lord Hardwicke, in *Roy v. the Duke of Beaufort*, was of opinion, that a person who had entered into a bond, with a penalty of 100*l.* if he poached, must have paid the 100*l.* if he had committed any act which amounted to poaching. But suppose the Duke had taken a bond in a penalty of 100*l.*, with condition that the obligor should not kill a partridge, or if he did, that he should pay 5*l.*, in that case it is most clear that the 5*l.* must have been considered as liquidated damages. With respect to the case of *Hardy v. Martin*, I do not understand why one brandy merchant who purchases the lease and good-will of a shop from another, may not make it matter of agreement that if the vendor trade in brandy within a certain distance, he shall pay 600*l.*; and why the party violating such agreement should not be bound to pay the sum agreed for; though if such agreement be entered into in the form of a bond, with a penalty, it may, perhaps, make a difference. I much wish that the principle laid down by Lord Somers, in *Prec. in Chan.* had been adhered to. Let us then see what this case amounts to. It was contended, at the trial, that the

last clause is not in the form of a penal bond. It is thus: 'and lastly, it is hereby agreed that either party failing to perform their undertaking shall pay to the other 200*l*.' *Prima facie* this certainly is contract, and not penalty; but we must look to the whole instrument. In consideration of the defendant's services, the plaintiffs undertake to pay her 1*l*. 11*s*. 6*d*. per week, and also her travelling expences. It would be absurd to hold, that because the 1*l*. 11*s*. 6*d*. is a liquidated sum, therefore the plaintiff could not be called upon for more; and yet, that in consequence of his non-payment of the defendant's travelling expences, he should be liable to the whole sum of 200*l*., because those expences are not ascertained. Again, there are many instances of the defendant's misconduct, which are made the subjects of specific fines by the laws of the theatre. Are we then to hold, that if the defendant happens to offend in a case which has been so provided for by those laws, she shall pay only 2*s*. 6*d*. or 5*s*.; but if she offend in a case which has not been so provided for, she shall pay 200*l*.? I can find nothing in those articles which can satisfy my mind, judicially, that the 200*l*. is to be paid in one case, and not the other. The clause is general, and contains no exception. If that be so, the case of *Fletcher v. Dyche* is an authority strongly in point. It therefore does appear to me that the true effect of this agreement is, to give the plaintiff his option, either to proceed upon the covenants *toties quoties*, or, upon the first breach, to proceed at once for the 200*l*., out of which he may be satisfied for the damage actually sustained, and which may stand as a security for future breaches."

So, in the case of *Smith v. Dickenson*, (u) which was an action of *assumpsit* upon the following agreement: "In consideration that the plaintiff would communicate to the defendant the nature of an invention, for which the plaintiff intended to take out a patent, the defendant undertook that he would not avail himself or take any advantage of such communication, under a penalty of 1000*l*. The Court were clearly of opinion, that the word "*penalty*," used in the agreement, effectually prevented them from considering the sum mentioned as *liquidated damages*."

And in the case of *Wilbean v. Ashton*, (w) it was held, that under an agreement for a penalty, the jury cannot give damages beyond it, nor ought they to give the party more than a compensation for the loss he proves he has sustained.

But, in the case of *Orr v. Churchill*, (x) which was an action of debt on bond, it appeared that the defendant, together with *Walter Cleland* and *Daniel Stewart*, were *jointly* and *severally* bound in the penal sum of 4470*l*. 2*s*. 2*d*. conditioned as follows: "Whereas the above-

(u) 3 Bos. & Pul. 630.
(w) 1 Campb. Rep. 78.

(x) 1 H. Bl. 227.

bounden *Walter Cleland* hath received from the above-named *John Orr* 6017 star pagodas, for which he has given to the said *John Orr* sets of his own private bills, upon Messrs. *Baillie, Pocock, and Co.*, payable to the order of the said *John Orr*, in manner hereinafter mentioned; that is to say, one set in triplicate, dated *Calcutta, January 29th, 1787*, for 2044*l. 3s. 4d.*, payable 365 days after sight thereof; and the other set in triplicate, bearing even date with these presents, for 190*l. 18s. 9d.*, payable four months after sight thereof; and to secure the due acceptance and payment of such bills respectively, they, the said *Henry Churchill* and *Daniel Stewart*, have proposed and undertaken to become bound, together with the said *Walter Cleland*; and that in the event of the said bills, or either of them, being protested for non-acceptance and non-payment, that they, the said *Walter Cleland, Henry Churchill, and Daniel Stewart*, or one of them, shall and will, upon producing to them or either of them such bill, with its protest, well and truly pay to the said *John Orr*, or his order, if demanded in *England*, the full amount of such bill or bills which shall be so protested, together with interest thereupon, of 5*l. per centum per annum*, from the day of the date or dates of such bill or bills, up to the day of such payment, by way of penalty."

The Court held, that the plaintiff was entitled to recover no more than the amount of the bills, with interest from the time of their becoming due. And Lord *Loughborough* Ch. J. said, "I do not go on the denomination given by the instrument; for whatever that may be in this case, that could not, by any possibility, have been an agreement for liquidated damages; which can only be where there is an engagement for the performance of certain acts, the not doing of which would be an injury to one of the parties, or to guard against the performance of acts, which, if done, would also be injurious. In such case an estimate of the damages may be made by a jury, or by a previous agreement between the parties, who may foresee the consequences of a breach of the engagement, and stipulate accordingly. But where the question is concerning the non-payment of money in circumstances like the present, the law having, by positive rules, fixed the rate of interest, has bounded the measure of damages; otherwise the law might be eluded by the parties. It may often indeed happen, that the damages sustained by a party contracting, by the non-payment of money at the time agreed on, may, by the particular arrangement of his affairs, be greater than the compensation recovered by computing the interest; but where money has a real rate of interest and value, the other party is not to be compelled to pay more than the law has declared to be such rate and value."

In the case of a *penalty*, though the plaintiff has his election to proceed either for the recovery of the penalty, or for general damages for

breach of the agreement, yet having once made his election, and recovered the penalty, he is bound by it, and cannot bring any action to recover further satisfaction. (y) But a party cannot, by tendering the penalty, or stipulated sum, be let off from a *specific performance* of an agreement. Thus, in the case of *Howard v. Hopkins*, (z) where it appeared that articles for the purchase of an estate had been entered into, with a proviso, that if either side should break the agreement, he should pay the other 100*l.*; and one ground of argument, on behalf of the vendor, against a bill for a specific performance, was, that it was the intention of the parties, that upon payment of 100*l.* by either of them, the agreement should be absolutely void. Lord Chancellor *Hardwicke* said, "As to the defence of the stipulated sum, I cannot consider that as a ground to let off either party when they please, it being no more than a common case with a penalty, which might be inserted by the vendee in order to be paid for his trouble of viewing and measuring the estate, &c. supposing the defendant should not be able to make out a title. In all these cases, where penalties are inserted in a case of non-performance, this has never been held to release the parties from their agreement, but they must perform it notwithstanding."

3. OF THE CANCELLING, RESCINDING, OR PUTTING AN END TO A CONTRACT.

A contract may, by the consent and agreement of all parties interested, be cancelled or rescinded either in the whole or in part, provided it be done before a breach has been committed; but if done after the contract has been broken, such consent is not legally binding without a release or agreement under seal. If a contract is subject to a condition, of which one of the parties alone can take advantage, such party may rescind it without the consent of the other: as, for instance, upon a sale of goods conditioned that they may be returned if the seller does not like them, &c., the latter has the option of determining the contract by returning the goods within a reasonable time. (a) So, a contract may be put an end to, by the wrongful act or default of one of the contracting parties; as, where the performance was made to depend upon a particular mode of measuring a certain quantity of coal to be supplied by one party from a seam or pit, and the other party, by some act done by himself, thereby wholly prevented that mode of measurement, and rendered such an estimate wholly impracticable; it was held, that the former was discharged, and the contract vacated. (b) So, where the performance of a contract is made to depend on something to be

(y) *Bird v. Randall*, 1 Bl. Rep. 373.
387.

(z) 2 Atk. 571.

(a) *Towers v. Barrett*, 1 T. R. 155.
(b) 2 Taunt. Rep. 150.

done or furnished by one of the parties, but which is neglected to be done, either within the time specified, or, if no time is expressed, within a reasonable time; the other party may abandon the contract altogether. (c) So, where there is a partial failure in the consideration upon a sale of goods by sample, as where the goods do not correspond with the sample, they may be returned to the vendor, or notice thereof may be given to him to take them away if they be bulky. So, where a contract of sale is concluded by the payment of earnest, and the purchaser, on the goods being tendered, refuses to accept them, but requests the seller to sell them for him, which he agrees to do, this amounts to a waiver of the original contract. But if no such request be made, and the seller takes back the goods, he may avoid the contract, and sell them to another person after the lapse of a reasonable time, and request made to the vendor to accept them. (d) In all cases where a party has the power of rescinding a contract, and is desirous of doing so, he must exercise that power within a reasonable time. But if a specific time is given, as upon a sale of a horse, where a month's trial was allowed, the vendee may rescind the contract at the end of the month, though in the interim he was desired by the vendor to return the horse on his saying he disliked the price. (e) So, it has been held, that, if after a contract for the sale of goods made in the city of London by a broker, and where the goods are to be paid for by a bill of exchange, the seller is dissatisfied with the credit of the buyer, he has a right to determine and put an end to the contract within a reasonable time. (f) In order, however, to rescind a contract, and treat it as wholly determined, both parties must be placed in the same situation as they were before the contract was made; and therefore where a party wishing to put an end to the contract has derived any benefit from it to the detriment of the other party, he cannot rescind or treat it as wholly determined. (g)

After a contract has been rescinded by one party, in consequence of the total non-performance of it by the other party, he may recover back any money which he has paid under it, provided he has done nothing which can be considered as an execution of his part of the contract. And if money be paid on a consideration which happens to fail, it may be recovered back as money had and received. (h)

(c) 2 Taunt. Rep. 525. n. a.

(d) 7 East Rep. 571. But see 3 Campb. 426.

(e) 1 New. Rep. 257.

(f) *Hodgson v. Davies*, 2 Campb. 530.

(g) 5 East Rep. 449.

(h) Vid. the cases on this subject, tit Money had and received, Part ii.

4. OF THE PERFORMANCE OF A CONTRACT OR AGREEMENT.

In this part of the work it will only be necessary to bring to the reader's attention some of the leading principles laid down for the due observance of a contract. On this subject, it is necessary in all cases to consider first, whether the contract or agreement contains mutual and independent agreements; for if it does, then each party is entitled to claim from the other a performance of the contract, or to recover damages for the non-performance; and it will be no legal ground of excuse, to allege that the party claiming has himself been guilty of a breach of the contract. Or secondly, whether the acts to be done on one side are to precede the acts to be performed on the other, and are, what is technically called, conditions precedent and dependent: if they are precedent conditions, they must be first performed. Thirdly, whether or not the agreements be mutual, and the acts agreed to be done are to be performed at the same time: if in the affirmative, then if one of the parties be ready at the agreed time, and offers to perform his part of the contract, and the other is not ready, he may maintain an action for such default, although it may be doubtful which of them is obliged to perform the first act.

In mutual agreements where the time of performance is clearly expressed, as if a horse is sold on the 1st of *May*, to be paid for on the 1st of *June*, the parties are of course concluded by the terms so expressed. But where the dependence or independence of the respective engagements is only to be collected from the evident sense and meaning of the parties, the rule is, that however the covenants or promises may be transposed, their precedency must depend upon the order of time in which the intent of the transaction requires their performance. (i) The learned editor of *Pothier* on Contracts, (k) in considering these general rules, has illustrated them by the following familiar examples: first, a landlord and tenant enter into reciprocal engagements, the tenant agrees to pay the rent, to plant a certain number of trees, to repair the fences; the landlord agrees to repair the house, to erect a barn, to pay the taxes. If the tenant brings an action against the landlord for not building the barn, it is no answer that the tenant has not planted the trees. If the landlord brings an action for the rent, the tenant cannot insist that the house is out of repair. Secondly, If a carrier engages to convey a bale of goods for a certain sum, he cannot demand the money until he has brought the goods to the place appointed. Thirdly, If a horse is sold for 20*l.* to be paid on delivery, one

(i) Vid. Doug. Rep. 690, 691.

(k) Vol. 2. p. 41.

party cannot demand the horse without paying the money, nor the other the money without delivering the horse. And it is observed by Mr. Serjeant *Williams*, in a note to the case of *Pordage v. Cole*, (*k*) "that almost all the old cases, and many of the modern ones on this subject, are decided upon distinctions so nice and technical, that it is very difficult, if not impracticable, to deduce from them any certain rule or principle by which it can be ascertained what covenants are *independent*, and what *dependent*. Thus, if A. covenant with B. to serve him for a year, and B. covenant with A. to pay him 10*l.*; it is held, that these are independent covenants; and A. may maintain an action against B. for the money before any service, but if B. had covenanted to pay him 10*l.* *for his services*, these words make the service a condition precedent; and A. cannot enforce payment of the money until he has performed the service. So, where A. covenants with B. to marry his daughter, and B. covenants to convey an estate to A. and the daughter in special tail, it is said, that though A. marry another woman, or the daughter another man, still A. may have an action against B. on the covenant; but if B. had covenanted to convey the estate *for the cause aforesaid*, the marriage is a condition precedent, and no action will lie until it be solemnized. (*l*) Also where A. in consideration of 10*l.* promised to deliver to B. all the books of the law, it has been said that B. may bring an action against A. for the books before any payment; but if A. in consideration that B. *will* pay him 10*l.* *will* deliver to him all the books of the law, B. cannot bring an action for the books before he has paid the money. (*m*) So, where B. covenanted with C., his copyholder, to assure to him and his heirs the freehold and inheritance of his copyhold, and C. in consideration of *the same performed* covenanted to pay such a sum, it was adjudged that this was a condition precedent, and B. must make the assurance before he is entitled to the money; but if the words had been in consideration of the said covenant *to be performed*, B. might bring an action for the money before he made the assurance. (*n*) And lastly, where articles of agreement were made between A. and B., and a covenant by A., that for the consideration thereafter expressed, he should convey certain lands to B. in fee, and B., on his part, for the consideration aforesaid, covenanted to pay a sum of money to A., it was held, that these were independent covenants, and A. might bring an action for the money, before any conveyance of the lands. (*o*) The general rule to be deduced from all the cases on this subject seems to be, that where there are several covenants, promises, or agreements, which are independent of each other, one party may bring an action against the

(*k*) 1 Saund. 520. n. 4.(*l*) Bro. Covenant 22. 12 Mod. 460
Hob. 106.(*m*) 1 Rol. Rep. 125.(*n*) 3 Leon. 219.(*o*) 1 Rol. Abr. 415. pl. 8. 1 Ld. Raym.
665, 6. 1 Lutw. 251, 2.

other for a breach of his covenants, &c., without shewing a performance of the covenants made on the part of the plaintiff; and it is no excuse for the defendant to allege in his plea a breach of the covenants on the part of the plaintiff. But where the covenants, &c. are dependent, it is necessary for the plaintiff to aver and prove a performance of the covenants, &c. on his part, to entitle him to an action for the breach of the covenants on the part of the defendant. The difficulty lies in the application of this rule to the particular case. It is justly observed, that covenants, &c. are to be construed to be either dependent or independent of each other, according to the intention and meaning of the parties, and the good sense of the case, and technical words should give way to such intention." (p) And the learned editor further observes, "that in order to discover that intention, a few rules will be found useful for that purpose; and 1st, if a day be appointed for payment of money, or part of it, or for doing any other act, and the day is to happen, or *may* happen *before* the thing which is the consideration of the money, or other act is to be performed, an action may be brought for the money, or for not doing such other act *before* performance; for it appears that the party relied upon his *remedy*, and did not intend to make the *performance* a condition precedent. And so it is where *no time* is fixed for performance of that which is the consideration of the money or other act. (q) But 2d, when a day is appointed for the payment of money, &c., and the day is to happen *after* the thing which is the consideration of the money, &c. is to be performed, no action can be maintained for the money, &c. before performance. (r) 3d, Where a covenant goes only to *part* of the consideration on both sides, and a breach of such covenant may be paid for in damages, it is an independent covenant, and an action may be maintained for a breach of the covenant on the part of the defendant, without shewing performance. As where A. by deed conveyed to B. the equity of redemption of a plantation in the *West Indies*, together with the stock of negroes upon it, in consideration of 500*l.*, and an annuity of 160*l.* for life, and covenanted that he had a good title to the plantation, was lawfully possessed of the negroes, and B. should quietly enjoy. And B. covenanted that A. *well and truly performing all and every thing therein contained* on his part to be performed, he would pay the annuity. In an action by A. against B. on this covenant, the breach assigned was the nonpayment of the annuity; plea, that A. was not at the time *legally possessed of the negroes* on the plantation, and so had not a good title to convey. The Court of King's Bench held the plea to be ill, and added, that if such plea were to be allowed, any one negro, not being the property of A.,

(p) 1 T. R. 645. 6 T. R. 668. 571. 7 T. R. 130.

(r) 1 Salk. 171. 12 Mod. 462. 1 Lutw. 251.

(q) Dyer. 76. a. 1 Saund. 330. 1 Ld. Raym. 665. 2 H. Bla. 389. 6 T. R. 572.

would bar the action. (s) The *whole* consideration of the covenant on the part of B. (the purchaser) to pay the money, was the conveyance by A., the seller, to him of the *equity of redemption* of the plantation, and also *the stock of negroes* upon it. The excuse for nonpayment of the money was, that A. had broke his covenant as to *part* of the consideration, namely, the stock of negroes. But as it appeared that A. had conveyed the equity of redemption to B., and so had, in part, executed his covenant, it would be unreasonable that B. should keep the plantation and yet refuse payment, because A. had not a good title to the negroes. (t) Besides, the damages sustained by the parties would be unequal, if A.'s covenant was held to be a condition precedent; (u) for A. on the one side would lose the consideration money of the sale, but B.'s damage on the other might consist, perhaps, in the loss only of a few negroes. So, where it was agreed between C. and D. that in consideration of 500*l.* C. should teach D. the art of bleaching materials for making paper, and permit him, during the continuance of a patent which C. had obtained for that purpose, to bleach such materials according to the specification; and C. in consideration of the sum of 250*l.* paid, and of the further sum of 250*l.* to be paid by D. to him, covenanted that he would with all possible expedition teach D. the method of bleaching such materials; and D. covenanted that he would on or before the 24th February 1794, or sooner, in case C. should before that time have taught him the bleaching of such materials, pay to C. the further sum of 250*l.* In covenant by C. against D. the breach assigned was the nonpayment of the 250*l.* Demurrer, that it was not averred that C. had taught D. the method of bleaching such materials; but it was held by the Court, that the *whole* consideration of the agreement being, that C. should *permit* D. to *bleach materials*, as well as *teach* him the method of doing it, the covenant by C. to teach formed but *part* of the consideration, for a breach of which D. might recover a recompence in damages: and C. having in part executed his agreement by transferring to D. a right to exercise the patent, he ought not to keep that right without paying the remainder of the consideration, because he may have sustained some damage by D.'s not having instructed him; and the demurrer was over-ruled. (v) 4th. But where the mutual covenants go to the *whole consideration* on both sides, they are mutual conditions, and performance must be averred. (w) 5th. Where two acts are to be done at *the same time*, as where A. covenants to convey an estate to B. on such a day, and in consideration thereof B. covenants to pay A. a sum of money on the *same day*, neither can maintain an action without shewing performance of, or an offer to perform, *his part*, though it is not certain which of them is obliged to do the first act; and this particularly applies to all cases of sale."

(s) *Boone v. Eyre*, 1 H. Bl. 273. n. a.

(v) 6 T. R. 570.

(t) *Per Ashhurst J.*, 6 T. R. 573.

(w) 1 Ventr. 147. 1 H. Bl. 270.

(u) 1 H. Bl. 279.

CHAPTER III.

OF THE STAMPING OF CONTRACTS AND AGREEMENTS.

ONE source of the revenue of this country arises from the imposition of stamp duties payable upon contracts and agreements, bills of exchange and promissory notes, law proceedings, and a multiplicity of other written instruments. — These duties having been so much varied and altered at different periods, according to the exigencies of the state, became extremely complicated; and it being difficult to ascertain the precise duty payable on each particular instrument, the legislature deemed it expedient to consolidate the stamp duties under one general act of parliament; and accordingly, the statute 44 Geo. 3. c. 98. was passed, the preamble of which recites, “whereas the several rates and duties upon stamped vellum, parchment, and paper, and upon other articles and things under the care of the commissioners for managing the said duties, are become very numerous, intricate, and complicated, and it will tend to give facility to business, and contribute materially to the public benefit, to consolidate and simplify the same;” and the several duties were by that act all consolidated under different schedules, and they took effect from and after the 10th October 1804. But the duties imposed by that statute were afterwards varied and altered by several other acts of parliament; and another general stamp act, viz. the 55 Geo. 3. c. 184. passed, and this took effect on the 1st Sept. 1815, and it is now in force; and such of the duties imposed by it, so far as they relate to the subject-matter of the present work, are contained in schedule, *Part the First*, and are as follow, viz.

Agreement, or any minute or memorandum of an agreement, made in *England* under hand only, or made in *Scotland* without any clause of registration, (and not otherwise charged in this schedule, nor expressly exempted from all stamp duty,) where the matter thereof shall be of the value of 20*l.* or upwards, whether the same shall be only evidence of a contract, or obligatory upon the parties from its being a written instrument, together with every schedule, receipt, or other matter put or endorsed thereon or annexed thereto;

	£.	s.	d.
Where the same shall not contain more than 1080 words (being the amount of fifteen common law folios, or sheets of seventy-two words each)	-	-	1 0 0
And where the same shall contain more than 1080 words	-	1	15 0

£. s. d.

And for every entire quantity of 1080 words contained therein,
over and above the first 1080 words, a further progressive
duty of - - - - - 1 5 0

Provided always, that where divers letters shall be offered in evidence
to prove any agreement between the parties who shall have written such
letters, it shall be sufficient if any one of such letters shall be stamped
with a duty of 1*l.* 15*s.* although the same shall in the whole contain
twice the number of 1080 words or upwards.

Exemption from the preceeding and all other Stamp Duties.

Memorandum or agreement for granting a lease or tack at rack-rents
of any messuage, land, or tenement, under the yearly rent of 5*l.*

Memorandum or agreement for the hire of any labourer, artificer,
manufacturer, or menial servant.

Memorandum, letter, or agreement, made for or relating to the sale
of any goods, wares, or merchandize.

Memorandum or agreement made between the master and mariners
of any ship or vessel, for wages, on any voyage coastwise from port to
port in Great Britain.

Letters containing any agreement (not before exempted) in respect
of any merchandize, or evidence of such an agreement, which shall
pass by the post, between merchants or other persons carrying on trade
or commerce in Great Britain, and residing and actually being at the
time of sending such letters at the distance of fifty miles from each
other.

By section X. of this statute it is declared, " that from and after the
passing of this act, all instruments for or upon which any stamp or
stamps shall have been used of an improper denomination or rate of
duty, but of equal or greater value in the whole with or than the stamp
or stamps which ought regularly to have been used thereon, shall never-
theless be deemed valid and effectual in the law ; except in cases where
the stamp or stamps used on such instruments shall have been specially
appropriated to any other instrument, by having its name on the face
thereof."

A written instrument, which requires a stamp, cannot be admitted in
evidence, unless it be duly stamped ; and no parol evidence will be re-
ceived of its contents. If, therefore, the instrument produced is the
only legal proof of the transaction, and that cannot be admitted for
want of a proper stamp, the transaction cannot be proved at all ; as, in
action for use and occupation, if it appears that the defendant held under
a written agreement, which for want of a stamp cannot be received, the
plaintiff will not be allowed to go into general evidence ; for the agree-

ment is the best evidence of the nature of the occupation. But it may happen, in a variety of cases, that the transaction is capable of being proved by other evidence besides the written instrument; and the objection arising from the stamp acts may be avoided by resorting to that other species of proof. (a)

A lost agreement, however, not having been stamped, precludes parol evidence. (b) And an agreement requiring a stamp, though coming out of the possession of an adverse party under a notice to produce, cannot be read in evidence without being properly stamped; (c) for the party requiring the production may, by an application to a judge, compel the opposite party to attend with it at the stamp office for the purpose of having it properly stamped.

The cases which will be brought in review in the remaining part of this chapter have been determined upon former stamp acts not now in force. But as those acts relate to duties payable on the same kind of instruments as are mentioned in the present stamp act, and as this act uses nearly the same words as the former, it is conceived the following cases will be found useful in the construction of the present stamp act. I shall therefore consider them in the following order, viz.

1. Of agreements not within the stamp acts.
2. Of agreements relating to different subjects, with several persons; and of distinct and separate agreements on the same paper, but with one stamp only.
3. Of the effect of altering an agreement after it has been executed.
4. Of the exempting clause relating to the sale of goods.
5. Of the exemption in favour of letters passing by the post between merchants and others, &c.

1. OF AGREEMENTS NOT WITHIN THE STAMP ACTS.

An agreement made abroad, or at sea, is not within the stamp acts. (d) But if an instrument be executed in a foreign country, and by the laws of that country a stamp is required, it cannot be received in evidence in this country, unless it is stamped with the proper stamp imposed upon such instruments by the laws of the foreign country. Thus, in the case of *Aloes v. Hodson*, (e) which was an action for sailors' wages for the voyage or run from *Jamaica* to *London*, upon the following written note, viz.

"Three days after the arrival of the ship *Neill Malcolm* at her moorings in the river *Thames*, I promise to pay *William Aloes* 50 guineas, if he

(a) Phil. on Evid. c. 9.

(b) *Rippiner v. Wright*, 2 Barn. and Ald. 478. et vide 3 B. & A. 588. S. P.

(c) *Dee v. Hore*, 2 Esp. Rep. 724.

(d) *Zimenes v. Jaques*, 1 Esp. Rep. 311.

Winbled v. Malmberg, Ibid. 454.

(e) 7 Term. Rep. 241. & 2 Esp. Rep. 528. S. C.

does his duty as an able seaman on board the said ship. *J. Hodson, Jamaica, July 25, 1796.*"

At the trial it was proved by a clerk from the office of the secretary of state, who produced the acts of assembly of the island of *Jamaica*, by one of which a stamp duty of 1s. 3d. was imposed on every sheet, or piece of paper, whereon was written any promissory note above 20*l.* and not exceeding 50*l.*, and so progressively. The note in question not being stamped, the counsel for the defendant objected to its being read in evidence. On the other side it was contended, that this was a mere revenue law of that country, by which the courts of this country were not bound. But *Kenyon Ch. J.* said, "In deciding on instruments made abroad, I think we are bound to consider the laws of that country where the contract is made; and if they are not obligatory by such laws, they cannot be enforced here. By the law of *Jamaica*, given in evidence, the instrument produced would be invalid for want of a stamp. I am therefore of opinion, that we cannot give it validity here." And of this opinion was the Court upon a motion to set aside the verdict, and for leave to enter a nonsuit.

So, an agreement made in *England* to accept a bill of exchange drawn abroad requires a stamp. (f) If an instrument be inadmissible in evidence in a foreign country without a stamp, it cannot in general be admitted in our courts; the law, however, of that country must be distinctly proved. (g)

A mere written acknowledgment of a debt need not be stamped. Thus, in the case of *Fisher v. Leslie*, (h) which was an action for money lent, and for money due upon an account stated. At the trial, in support of the plaintiff's case, the following paper writing, signed by the defendant, was produced and proved, "I. O. U. eight guineas." On the part of the defendant, it was contended that this paper ought to be stamped, either as a promissory note, or a receipt for money. But *Eggle Ch. J.* said, "I am of opinion that it is merely an acknowledgment of a debt, and neither a promissory note or a receipt; and it was accordingly admitted and read in evidence.

A letter containing a contract of marriage need not be stamped, being considered as falling within the words, "the matter thereof not being of the value of 20*l.*" (i) So, an agreement to confess judgment for a sum exceeding 20*l.*, to secure a sum under that amount and costs, is an agreement under 20*l.* (k) So, where an article is sold by auction in separate lots to the same purchaser, if each separate lot be under 20*l.* value, no stamp is requisite. (l)

A *cognovit* containing any matters of agreement, as to take the debt

(f) *Crutchley v. Mann*, 1 Mar. 29.
5 Taunt. 529. S. C.

(g) 3 Campb. 166.

(h) 1 Esp. Rep. 426. 1 Campb. 499.

But see Chitty on Bills, 5 ed. 428. n. 5.

(i) *Orford v. Cole*, 2 Stark. 351.

(k) *Ames v. Hill*, 2 Bos. & Pul. 150.

(l) *Emmerson v. Heelis*, 2 Taunt. 38.

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by instalments, must have an agreement stamp. But a mere *cognovit* without any matter or agreement does not require a stamp. (m) Articles of agreement *under seal* cannot be given in evidence unless stamped with a deed stamp. (n) An instrument by which the party promises to pay the sum of 65*l.*, and also such other sums as, by reference to his books, he owed, with interest, is not a promissory note, and, therefore, cannot be given in evidence without an agreement stamp. (o) A memorandum given by an overseer of the poor to the reputed father of a bastard that he had received a bill of exchange for a certain sum of money, which when paid would exonerate him from the expences attending the birth and maintenance of such child, does not require an agreement stamp. (p)

A copy of an advertisement in the *Gazette*, of an agreement to dissolve a partnership, must have an agreement stamp. (q) But a mere notice of a dissolution does not require to be stamped. (r)

If an action is brought upon an agreement contained in a prospectus of terms delivered by the plaintiff to the defendant, that identical prospectus so delivered must be stamped; the stamping of a copy is not sufficient. (s) It has, however, been held, that a person signifying by a printed prospectus the terms on which he was ready to engage to perform particular services, may, in an action against one who has employed him under those terms by a parol agreement, read the prospectus in evidence, without being stamped. (t) But a schoolmaster's printed terms delivered to a parent, requiring a month's notice of the removal of a scholar, cannot be given in evidence without a stamp. (u)

A proposal to do certain works, containing an estimate of the amount, not finally acceded to, may be read in evidence, although not stamped. (v)

A written paper *signed by an auctioneer*, and delivered to the bidder, to whom lands were let by auction, containing the description of the lands, the term for which they are let to the bidder, and the rent payable, must be stamped, though it be only evidence of part of the contract. (w) But unless such paper be *signed* by the auctioneer, it need not be stamped. (x) And any writing which would be evidence of part of the contract only, must be stamped. (y)

So, a schedule requires a stamp, as being part of the agreement to which it is annexed. (z)

(m) *Reardon v. Swaby*, 4 East. Rep. 188.

(n) *Robinson v. Drybrough*, 6 T.R. 517. Sed ante sect. 10. of the stamp act.

(o) *Smith Nightingale*, 2 Stark. 375.

(p) *Watkins v. Hewlett*, 3 Mo. 211.

(q) *May v. Smith*, 1 Esp. Rep. 285.

(r) *Jenkins v. Blizard*, 1 Stark. 418.

(s) *Williams v. Stoughton*, 2 Stark. 292.

(t) *Edgar v. Blick*, 1 Stark. 464.

(u) 2 Stark. 292.

(v) *Penniford v. Hamilton*, 2 Stark. 475.

(w) *Ramsbottom v. Mortley*, 2 M. & S. 445.

(x) *Same v. Tunbridge*, Ib. 434.

(y) 2 M. & S. 445.

(z) 3 East Rep. 526.

So, a bill of parcels subscribed "Settled by two bills, one at nine and the other at twelve months," requires either a receipt or an agreement stamp. (a)

2. OF AGREEMENTS RELATING TO DIFFERENT SUBJECTS WITH SEVERAL PERSONS; AND OF DISTINCT AND SEPARATE AGREEMENTS ON THE SAME PAPER, BUT WITH ONE STAMP ONLY.

It is now settled, that though a deed or agreement may affect the separate interest of several parties, yet if there be a community of the same subject matter as to all of them, one stamp will be sufficient; but where the parties have separate and distinct interests in different subjects, in that case there must be a separate stamp for each party. (b) Thus, in the common case of a deed or agreement between a debtor and his creditors, where each creditor signs the same, and thereby agrees either to give further day of payment of their respective debts, or to accept a certain sum by way of composition; in that case, though the agreement is in fact a separate covenant, and the several deed of each creditor, yet, as there is a community of the same subject matter, and the whole being one transaction only, a separate stamp for each person is not required. (c) So, where one paper contains two contracts for the purchase of different lots by several persons, and a proper stamp be impressed on that part of the paper on which is written one of the contracts, this is sufficient to legalize the evidence of that particular contract. But in order to make both contracts binding, there must be two stamps. (d)

So, though an agreement by several individuals for a subscription to one common fund, is, in its nature, separate as to each subscriber, yet it requires but one stamp. (e) And an agreement relative to prize shares, though several as to each person, requires one stamp only. (f) So, where a wager upon a horse-race was reduced into writing, which was duly stamped, and the bet was afterwards, by indorsement, doubled; it was determined that the stamp was sufficient to cover the original bet, but not the latter. (g)

3. OF THE EFFECT OF ALTERING AN AGREEMENT AFTER IT HAS BEEN ONCE EXECUTED AND DELIVERED.

Where an agreement has been signed by one party only, and previously to the other party signing it, a new stipulation is inserted; such

(a) *Smith v. Kelly*, 4 Esp. Rep. 249.

(b) 13 East Rep. 246.

(c) 1 New. Rep. 274. 1 Marsh. 525.

(d) 12 East Rep. 6. 13 East Rep. 241.

(e) 13 East Rep. 232.

(f) *Ibid.* 235. n. 6.

(g) Peake's N.P. Cas. 127.

agreement does not require a new stamp. (k) But after it has been once executed by both parties, and delivered, if any *additional stipulation* or other *material alteration* be made, it will require a new stamp; unless it happen to be an *immaterial alteration*. (i)

4. OF THE EXEMPTION CLAUSE RELATING TO THE SALE OF GOODS.

Upon the exemption clause in the stamp acts relating to the sale of goods, it has been determined, that a contract for the sale of a quantity of oil in a raw state, and consequently not capable of immediate delivery at the time of sale, is nevertheless within the clause, as being a contract relating to the sale of goods. (k) But where the subject matter of contract does not exist in the state of goods at the time of making the contract, and requires labour and materials to bring it into that state, in that case the contract does not fall within the exemption. (l) A receipt for the price of a horse, containing a warranty, does not require an agreement stamp. (m) An agreement to share in goods purchased by one of the contracting parties on their joint account, does not require a stamp. (n) But an agreement between merchants, that one shall take a share in an outfit of a ship and the adventure, is not an agreement for the sale of goods within the exception; and therefore must be stamped. (o) But an agreement by a broker to indemnify his principal on the re-sale of goods purchased by him, need not be stamped; such agreement being considered as relating to the sale of goods. (p) So, an undertaking to guarantee the payment of goods sold to a third person, is within the exception. (q) And a stipulation for rescinding a former agreement for the sale of goods, does not require an agreement stamp. (r) Again, an unstamped agreement is valid, so far as it relates to the sale of goods, though it contains stipulations unconnected with the contract of sale. (s)

An executory agreement for making and putting up of machines in a house, does not fall within the exception. (t) So, an agreement for the sale of crops growing, is not within the clause of exemption. (v)

(k) *Bathe v. Taylor*, 15 East Rep. 417, 418. *Sanderson v. Symonds*, 1 Brod. & Bing. 426.

(l) 1 Brod. & B. 426. and see Chitty on Bills, 6 ed. 101, &c.

(k) *Wilks v. Atkinson*, 1 Marsh. 412.

(i) *Waddington v. Bristow*, 2 Bos. & Pul. 452.

(m) 2 Campb. Rep. 407.

(n) *Venning v. Leckie*, 15 East Rep. 7.

(o) *Leigh v. Banner*, 1 Esp. Rep. 405.

(p) *Curry v. Edensor*, 3 T. R. 524.

(q) *Warrington v. Furber*, 8 East Rep. 342. *Watkins v. Vince*, 2 Stark. 368.

(r) *Whitworth v. Crockett*, ib. 431.

(s) *Heron v. Granger*, 5 Esp. 269.

(t) *Buxton v. Bidall*, 5 East Rep. 505.

(v) 2 Taunt. 56. 2 Bos. & Pul. 452.

5. OF THE EXEMPTION OF LETTERS PASSING BY POST
BETWEEN MERCHANTS AND TRADERS.

In the case of *Mackenzie v Banks*, (w) which was an action on the defendant's undertaking to pay the debt of his mother, who was in trade, the debt arose in the course of her business, which the defendant assisted her in carrying on, though without any share in it. The evidence of the undertaking was a letter written by the defendant to the plaintiff. And the question was, whether it ought to have been stamped, as all agreements in writing are required to be by the 23 Geo. III. c. 58. "whether the writing be only evidence of the contract, or obligatory upon the parties from its being a written instrument;" or whether this letter came within the exception of the 32 Geo. 3. c. 51. s. 1., by which it is provided that the first-mentioned act "shall not extend to make liable to the said stamp duty any letter passing by the post *between merchants, or other persons carrying on trade or commerce in this kingdom*, residing at 50 miles distance from each other." At the trial, the letter had been received in evidence unstamped by Lord *Kenyon* Ch. J., and the plaintiff obtained a verdict. But a motion was afterwards made to set aside the verdict, on the ground that the letter did not fall within the terms of the exception in the latter statute: and it was argued that the defendant was neither a merchant or trader; he had no concern in his mother's business. The letter was not written by him as agent for his mother, in which case, perhaps, the exception might have extended to him, but in his own individual character to pay the debt of another. His promise, therefore, was like that of any other indifferent person. The legislature only intended to protect persons, whose ordinary business led them to write to each other in the course of their own particular callings. A person, who was not a trader, although he wrote a letter concerning some trading contract, would not be within the words or meaning of the exemption. But the Court said, "It appears in evidence that the defendant did carry on the business for his mother, and that this debt arose in the regular course of the trade. And therefore any letter written by him on account of that very trade, whereby he bound himself to another tradesman, may fairly be construed to fall within the letter and spirit of the act; which meant that the correspondence of merchants and tradesmen at a distance from each other, on the faith of which they had considerable dealings, should not be fettered with stamps."

A letter to a correspondent, requesting him to pay to certain persons or their order 600*l.* out of the first proceeds that should become due of a stock of gunpowder then in his hands, and to charge the same to ac-

(w) 5 Term Rep. 176.

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count, is not within the exception of the act, but must be stamped as a bill of exchange, although the letter form part of a subsequent correspondence between the three houses. (x) So, a letter from a principal to his factor, containing bills of exchange drawn upon the latter, and in which the principal promised to provide for the bills if certain goods, then either in the factor's possession or about to be placed in his hands, should remain unsold at the time of the bills falling due, requires to be stamped, and does not come within the exception in the stamp act, as a letter for or relating to the sale of goods; the primary object of such letter not being the sale of goods, but the obtaining of an advance of money on the goods. (y)

(x) *Butts v. Swan*, 2 Brod. & Bing. 78. (y) *Smith v. Cator*, 2 B. & A. 778.
Firbank v. Bell, 1 B. & A. 36.

CHAPTER IV.

OF CONTRACTS AND AGREEMENTS DEEMED ILLEGAL.
BY THE COMMON AND STATUTE LAW.

ALL contracts or agreements which have for their object any thing which is either repugnant to justice, or in violation of religion or public decency, are void. So, are all contracts made in contravention of the general policy of the common law, or in direct opposition to the provisions of an act of parliament: for *ex turpi contractu actio non oritur* is a rule both in law and equity. (a) And whenever a contract or agreement is entered into with a view to contravene any of these general principles, there is no form of words, however artfully introduced or omitted, which can prevent courts of law and equity from investigating the truth of the transaction. And therefore, in an action upon a bond (b) given for compounding a prosecution for perjury, it was argued in support of the action, that no averment could be admitted of the bond having been given for such a consideration, because it did not appear in the condition. But to this it was answered by Lord Ch. J. *Wilmot*, "That the manner of the transaction was to gild over and conceal the truth; and whenever courts of law see such attempts made to conceal such wicked deeds, they will brush away the cobweb varnish, and show the transactions in their true light. This is an agreement to stifle a prosecution for wilful and corrupt perjury, a crime most detrimental to the commonwealth; for it is the duty of every man to prosecute, appear against, and bring offenders of this sort to justice. This is a contract to tempt a man to transgress the law, to do that which is injurious to the community: it is void by the common law; and the reason why the common law says such contracts are void, is for the public good. *You shall not stipulate for iniquity.* All writers upon our law agree in this, that no polluted hand shall touch the pure fountains of justice. Whoever is a party to an unlawful contract, if he hath once paid the money stipulated to be paid in pursuance thereof, he shall not have the help of a court to fetch it back again; you shall not have a right of action, when you come into a court of justice in this unclean manner to recover it back."

Upon the same principle it has been determined, that if A. promise B. money in consideration that he will not give evidence in a suit depending, such promise cannot be enforced; it being unlawful and iniquitous

(a) See Fonbl. Treat. of Equity, vol. i. (b) *Collins v. Blantern*, 2 Wils. 341. 347.
bk. 1. c. 4. s. 4. n. y. See also 1 P. Wms. 156. 220.

for any man to suppress testimony in any cause. (c) So, a promise made by the friend of a bankrupt when the latter was on his last examination, that in consideration that the assignees and commissioners would forbear to examine him touching certain sums which he was charged with having received and not accounted for, he would pay such sums as the bankrupt had received and not accounted for, is void; as being against the policy of the bankrupt laws: for the intention of the legislature was, that the creditors should have the full examination of the bankrupt as to the state of his effects and the disposition of them; whereas the promise in this case would be to induce the assignees and commissioners to forbear doing their duty. (d) But a covenant by a friend of a bankrupt to pay all his creditors their full debts, in consideration that they will not proceed any further under the commission, is lawful. (e) So, an agreement not to move the court against an attorney for malpractices, is illegal and void. (f) But a promissory note given by a party indicted for a misdemeanor, for the amount of the costs and expences of the prosecution, is valid when given after the conviction, and at the recommendation of the court. (g) A contract or agreement must be unlawful at the time of making it, otherwise it cannot be set aside; for it is said, (h) the law knows of no contract but what was *good or bad at the time of the contract made*; it cannot be one or other according to a subsequent contingency.

In this chapter it will only be necessary to bring before the reader a general view of the cases in which contracts and agreements are declared void by the common law, and those which are prohibited by statute. In considering those which come under the first class, it is hardly necessary to observe, that every contract or agreement which has for its object any thing forbidden by the law of God; as to commit murder, theft, perjury, or other crime, is void by the common law. Therefore, if a man is under an obligation to pay to another 20*l.* if he will kill or rob such a person; this is a void obligation, and creates no right. (i) The common law also prohibits every thing which is unjust, or *contra bonos mores*. Therefore, a contract or agreement which is made in contravention of these general principles is void: for instance, if A. promise, in consideration of 20*s.* paid to him by B., he will pay B. 40*s.* if he does not beat J. S. out of such a close; this is illegal and void. (k) So, if A. request B. to beat another, and promise to save him harmless; this is a void consideration, for the act is unlawful. (l) But it is said, (m) if I request another to enter into B.'s land, and in my name

(c) 1 Leon. 180.

(d) *Nerot v. Wallace*, 3 Term Rep. 17.(e) *Kaye v. Bolton*, 6 Term Rep. 134.

(f) 1 Campb. Rep. 55.

(g) 11 East Rep. 46.

(h) Per *Cnr.* 10 Mod. 67. See also Bul. N. P. 146.

(i) Fitzh. Abr. tit. Obligation, 15.

(k) 2 Lev. 174.

(l) Hutt. 56.

(m) Per *Hobart*, in the case of *Hutton and Winch*, Win. 49.

to drive out the beasts and impound them, and promise to save him harmless, this is a good *assumpsit*, though the act is tortious.

2. OF CONTRACTS RESPECTING COHABITATION AND PROSTITUTION.]

— Contracts entered into with a view to future cohabitation and prostitution are illegal and void, as being against public morality. (n) But an engagement merely by way of reparation for *past* seduction and cohabitation is valid; for this is no more than what a man ought, in honour and conscience, to do. (o) But a contract for the use and occupation, of lodgings which are let expressly for the purposes of prostitution, is void. (p) Though an agreement to pay for the washing and getting up of expensive articles of dress for a prostitute is valid, though it be known to the party by whom the work is done, that the dresses are to enable her to appear at public places, &c. (q)

3. OF CONTRACTS MADE IN RESTRAINT OF TRADE.] — All contracts, which have for their object any thing contrary to the principles of sound policy, are void by the common law. (r) Under this description may be ranked contracts which bind any to a total restraint of trade; for all such obligations are contrary to principles of *national* policy, one great object of which is to encourage and promote trade. Therefore it has been holden, that a promise or obligation which binds any to a *total* restraint of trade, whether for a limited time or generally, is unlawful and void. (s) But, if a man for a good consideration restrains himself from the exercise of his trade in a particular place, this is lawful; for the policy of the nation is not concerned in what place a man exercises his calling. And there may happen instances wherein such a contract may be useful and beneficial; as to prevent a town from being overstocked with any particular trade; or, in the case of an old man, who, perceiving himself under such circumstances of body or mind as that he is likely to be a loser by continuing his trade, will find it better to part with it for a consideration; that, by selling his custom, he may procure to himself a livelihood, which he might probably have lost by trading longer. (t)

4. OF RESTRAINT OF MARRIAGE.] — Upon the same principle of public policy the common law makes void all contracts and agreements which totally restrain a person from marrying, or from marrying any body except a particular person, without imposing an obligation to marry that particular person: Thus, where A. promised B. that he

(n) *Walker v. Perkins*, 3 Burr. 1568. See also 2 Ves. 160. 5 Vet. jun. 293.

(o) *Armandale v. Harris*, 2 P. Wms. 432. *Cray v. Rooks*, Forrest. 153. *Turner v. Faughan*, 2 Wils. 339.

(p) 1 Esp. Rep. 13. Ni. Pri. Abr. 59, 60.

(q) 1 Bos. and Pul. 340. See also, 1 Campb. 348.

(r) Vide Cowp. 39.

(s) Vide *Mitchel v. Reynolds*, 1 P. Wms. 181. *Et post*, Part II. c. 10.

(t) *Ibid*.

would not marry with any person besides herself; and if he did, he agreed to pay her 1000*l.* The Court held, that this was an agreement in restraint of marriage; for it was not a covenant to marry the plaintiff, but not to marry any one else; and yet she was under no obligation to marry him; so that it restrained him from marrying at all, in case she had chosen not to permit him to marry her. (u)

5. MARRIAGE BROCCAGE CONTRACTS.]—So, all marriage broccage contracts are void. (v) These contracts are so called from the circumstance of their promising a reward to a person if, by reason of the influence which he may possess over one of the parties to the match, which is sought to be accomplished, he can procure a marriage between them. They are also considered to be of a very pernicious tendency, by being the occasion of many unhappy marriages.

6. SIMONICAL CONTRACTS.]—So, all *simoniacal contracts* are void: Thus, where the consideration of the contract was, that the plaintiff would procure the defendant to be presented and instituted to a chapel, which was a donative in the king's gift; it was adjudged illegal, on the ground of its being simony, and therefore incapable of supporting an *assumpsit*. (w)

7. OF MAINTENANCE OF SUITS.]—So, all contracts and agreements for the maintenance of suits are illegal and void. (x) Maintenance is an officious intermeddling in a suit that no way belongs to one, by maintaining or assisting either party with money or otherwise, to prosecute or defend it. It is an offence against public justice, as it keeps alive strife and contention, and perverts the remedial process of the law into an engine of oppression. A man may, however, maintain the suit of his near kinsman, servant, or poor neighbour, out of charity and compassion, with impunity. And any agreement made in respect of such maintenance is valid. (y)

8. OF CONTRACTS OR PROMISES MADE WITH SHERIFFS.]—If a sheriff for 10*l.* promise that a prisoner shall escape, this promise is unlawful and void. (z) So, where A. is in execution at the suit of B.; and C., in consideration that the gaoler will permit A. to go at large, assumes and promises to him that A. shall pay the debt at a certain day, and that he the said C. will save the gaoler harmless; this promise is void, because the consideration is against law. (a) Or, if a promise be made to a bailiff, to give him a sum of money to accept bail, it is void; it being the duty of the sheriff to take good and sufficient bail when tendered to him. (b)

(u) *Lowe v. Peers*, 4 Bur. 2225. See also 10 East Rep. 22. 2 Atk. 538. 540. 4 Term Rep 359.

10 Ves. jun. 422.

(v) See *Arundel v. Trevillian*, 1 Ch. Rep. 47. 4 Bro. P. C. 144. 8vo. ed.

(w) *Cro. Car.* 337. 353. 361. See also the case of *Fytche v. Bishop of*

London, Burn's Eccl. Law, tit. Simony,

(x) See 1 Leon. 179. Dy. 355. b.

(y) See 1 Hawk. P. C. cap. 83.

(z) 10 Co. 102. *Cro. El.* 199.

(a) *Yelv.* 197. 2 Bulst. 213.

(b) *Smith v. Stotesbury*, 2 Bur. 924. 1 Bl. Rep. 204. S. C.

And if A. obtains a judgment against B., and thereupon takes out an *elegit*, and delivers it to the under-sheriff, who by virtue thereof seizes certain goods of B.; and afterwards the under-sheriff, in consideration that A. will take out a new *elegit*, and deliver it to him, promises to cause and procure the said goods to be found by inquisition, and to deliver the same to such person as A. shall appoint, &c.; this promise is against law, being to do a thing against the duty of his place, by which he is bound to return an indifferent and equal jury between the parties; and though part of the promise was to do a lawful act, yet that depending upon the other part, which was illegal, makes the whole void. (c)

But a contract to indemnify a sheriff in the doing of a lawful act is good; as where a plaintiff in an action pointed out particular goods, and desired the sheriff to take them under a *feri facias*; and in consideration that the sheriff would take them, the plaintiff promised to indemnify him; this was held a valid promise; for the plaintiff having pointed out the goods, and required the sheriff to take them in execution, it was reasonable that he should save the sheriff harmless. (d) So, where A. was arrested, and C. in consideration that the bailiff would suffer A. to continue in the house of C. till the next morning, promised that he would then deliver A. in safe custody to the bailiff; this was held to be a lawful consideration; for it shall not be intended that the bailiff was ever absent from B., so that it could be no escape. (e)

9. **TRADING WITH AN ENEMY.]** — All trading with the subjects of an enemy's country without the king's licence, is illegal. Therefore, a policy of insurance on enemy's property is void. (f) It is also illegal for a subject in time of war, without the king's license, to bring, even in a neutral ship, goods from an enemy's port, which were purchased by his agent resident in the enemy's country, after the commencement of hostilities; although it may not appear that they were purchased of an enemy. (g) But, a neutral subject residing in the enemy's country, and carrying on trade there in partnership with an alien enemy, may insure his interest in the joint property. (h)

10. **OF WAGERS.]** — All wagers which have a tendency to incite a breach of the peace, or which are contrary to principles of sound policy or morality, are illegal, and void by the common law: as, if a wager be laid on the event of a battle; (i) or upon the sex of a person; (k) or upon the event of war or peace; (l) or of an election of members to

(c) T. Jones 24. Cart. 225.

also 8 East Rep. 273. Long on Sales.

(d) Cro. Jac. 652. See also 1 Ld. Raym. 279.

17. 92.

(e) 1 Sid. 132. 1 Lev. 98.

(g) *Potts v. Bell*, 8 Term Rep. 548.

(f) 8 Term Rep. 548. 6 Term Rep. 25. 561. 4 East 402. 417. *Et vid.* Bac. Abr. tit. Alien. D. as to the distinction between alien friend and alien enemy, &c. See

(h) 6 Term Rep. 413.

(i) 5 Term Rep. 405.

(k) Cowp. 729.

(l) 1 Term Rep. 57. n. b.

serve in parliament; (m) or respecting the produce of any branch of the revenue: (n) these are unlawful and void. And, if a wager is made merely as a colour to disguise an illegal transaction, as simony, bribery, usury, or the like, they are equally void. (o) But, in general, a wager may be considered as legal if the subject of it has no immediate tendency to a breach of the peace, or to affect the feelings or interest of a third person, and is not contrary to the principles of morality or sound policy.

11. *OF GAMBLING OR SPECULATING CONTRACTS MADE UNDER COLOUR OF A SALE OF GOODS.*] — It has been recently determined in our courts of *nisi prius*, that if two persons enter into a contract under the semblance of a sale of goods, not intending really to buy or sell the commodity, but merely as a gambling speculation, and to pay the difference of the market price on a particular day, like a time bargain in the stocks, such a contract is illegal and void at common law, and no action will lie to enforce it. (p)

12. *OF FRAUD.*] — Contracts which are infected with fraud are void both at law and in equity; for the basis of all dealings ought to be good faith. Therefore, where two sutlers (q) to several regiments of militia (who as such were entitled to certain forage of oats and hay for divers horses daily out of the king's magazine belonging to the camp) entered into an agreement with the person who furnished and supplied the magazine, that the sutlers would abstain from taking the forage, or such part thereof as they should think fit, and would leave the same to be the property of the person supplying them, and that he should pay and allow them 9½d. by the ration, for every ration to which they should be entitled, and which they should so leave at the magazine: this was held to be a corrupt agreement between the parties, as having for its object the cheating of government, by taking a composition for the forage of the whole number of horses allowed, whether they were kept or not, which was a clear fraud upon the public.

So, where goods are put up to sale by public auction, under the usual conditions, viz. "that the highest bidder shall be the purchaser," if the owner, or any third person on his behalf, *secretly* attend the sale and bid for the goods, in order to enhance the price, it is a fraud upon the real bidders; and the sale is therefore void. (r) Again, if A. agree to purchase goods of B. at a certain sum for the benefit of C.; any secret

(m) 1 Term Rep. 56.

(n) 2 Term Rep. 610. 2 Bos. and Pul. 150.

(o) Cowp. 39.

(p) *Hilberds v. Pettipierre*, coram Ld. Ch. J. Abbott, at the sittings at Guildhall in Oct. 1822, upon a contract for tallow. Gurney and Comyn for the plaintiff, and Campbell for the defendant. A similar case happened before the

same learned judge, of *Wardle & Fowler*, in which Campbell was for the plaintiff, and Wilde for the defendant.

(q) *Willis* and another v. *Baldwin*, Doug. 450.

(r) *Berwell v. Christie*, Cowp. 395. *Howard v. Castle*, 6 Term Rep. 642. S.P. And see *Christie v. the Attorney General*, 6 Bro. P. C. 520.

agreement between B. and C., that the latter shall pay a further sum for them is void, as a fraud on A.; and C. is not liable to pay such further sum. (s) So, an agreement to pay so much in the pound for recommending customers to purchase goods, is said (t) to be illegal; such engagements having a tendency to enhance the price of the goods, and consequently a species of fraud upon third persons. Again, if all the creditors of an insolvent consent to accept a composition for their respective demands upon an assignment of his effects by a deed of trust, to which they are all parties, and one of them, before he executes, obtain from the insolvent a promissory note for the residue of his demand, by refusing to execute till such note be made; the note is void in law, as a fraud on the rest of the creditors; and a subsequent promise to pay it, is a promise without consideration, and therefore will not support an action. (u)

The only remaining circumstance which need be noticed in this general view of the subject is the *fraudulent representation, or concealment of material circumstances, which, it is said, (v) vitiates all contracts.* For it is a rule, that each of the contracting parties is bound to disclose faithfully to the other all material circumstances within his knowledge respecting the subject matter of the contract; and if this be omitted, either from design, neglect, or accident, the contract is void. With respect, however, to concealment, it is apprehended that the rule only applies to cases of concealment of material circumstances which are *exclusively* within the knowledge of *one* of the contracting parties, and does not extend to cases of sales, where both parties inspect the commodity bargained for, and each exercises his own judgement as to the quality and value, &c. and where no deceit is practised by either party. (w)

2. OF CONTRACTS DECLARED VOID BY STATUTE.

Having shown what contracts and agreements are void at the common law, we will now consider shortly those which are declared void by statute; and here it may be remarked, as a general rule, that every contract made for or about any matter or thing which is prohibited and made unlawful by any statute, is a void contract, though the statute itself does not mention that it shall be so, but only inflicts a penalty on the offender; because a penalty implies a prohibition, though there are

(s) *Jackson v. Duchaire*, 3 Term Rep. 551.

(t) Per Ld. *Ellenborough, Wyburd v. Stanton*, 4 Esp. Rep. 179.

(u) *Cockshot v. Bennett*, 2 Term Rep. 763. *Jackson v. Lomas*, 4 Term Rep. 166.

Licester v. Rose, 4 East 372. S. P.

(v) Per *Yates*, Just. 2 Bl. Rep. 465. See also 2 P. Wms. 170. Doug. 260. 1 Term Rep. 12. Skin. 327.

(w) Vide 2 Bl. Com. 451. 3 Bl. Com. 166. See also Sugden's Law of Vendors, 3 Ed. 189. 223.

no prohibitory words in the statute. (x) And in a very recent case, (y) Lord Eldon said, "It is quite clear that a court of justice can give no assistance to the enforcement of contracts which the law of the land has interdicted." So, a contract which is declared by a particular statute to be illegal, is not made good by a repeal of that statute after the contract has been executed. (z) And the circumstance of the contracting parties being ignorant of the law, and being innocent of any intention to violate it, will be no excuse.

1. OF CONTRACTS MADE ON SUNDAY.] — Every contract made on a Sunday by a person in the exercise of his ordinary calling is void by the stat. 29 Car. 2. c. 7. But, a sale of goods made on that day, which is not made in the exercise of the ordinary calling of the vendor or his agent, is not void either at common law or by statute. (a)

2. OF SALE OF OFFICES.] — By the statutes 12 R. 2. c. 2. and 5 & 6 Ed. 6. c. 16. the sale of certain public offices, and the deputations thereof are prohibited, and by the latter statute it is enacted, that all agreements, covenants, bonds, or assurance for any of the said offices, or the deputation thereof, shall be void. (b)

3. SHERIFFS.] — By the stat. 23 Hen. 6. c. 9. the sheriff is directed to let out of prison all persons by them arrested on mesne process, or by cause of indictment of trespass, upon reasonable sureties of sufficient persons. And it is enacted, "that no sheriff shall take any obligation for any cause therein directed, but only to themselves, of any person, nor by any person which shall be in their ward by the course of the law, but by the name of their office, and upon condition written, that the said prisoners shall appear at the day contained in the writ, bill, or warrant, and in such places as the said writs, bills, or warrants, shall require. And that if any of the said sheriffs, or other officers or ministers, take any obligation in other form, by colour of their offices, it shall be void."

Upon this statute it has been holden, that if a sheriff let a prisoner, who is not bailable, go at large upon his single bond; such obligation is void. (c) And this statute also extends to *promises*, as well as to *obligations*: and accordingly it has been holden, (d) that an agreement in writing to put in good bail for a person arrested on mesne process, at the return of the writ, or surrender the body, or pay debt and costs, made by a third person with the bailiff of a sheriff, in consideration of his discharging the party arrested, was void by the statute of Hen. 6.; for, since the passing of that statute, the usage has been to take the security by bond; and that bond, by the words of the statute,

(x) Carth. 252. 1 Taunt. 136. 5 Barn. and Ald. 335.

(y) Ex parte Dyster, 2 Rose Bkpt. cas. 351.

(z) 1 H. Blac. 65.

(a) *Drury v. Defontaine*, 1 Taunt. 136.

(b) See also the late stat. 49 Geo. 3. c. 126. And for the cases on this subject, vide Part ii. c. 11.

(c) 10 Co. 100. b.

(d) *Rogers v. Reeves*, 1 Term Rep. 41 s.

must be entered into to the sheriff, or to such officer as has the return of process; whereas here was no bond, but a mere simple contract, and that with the sheriff's officer; and farther the bond must be given only for the appearance of the party, and for no other purpose.

4. OF USURIOUS CONTRACTS.] — By the stat. 12 Ann. st. 2. c. 16. to prevent *usury*, it is enacted, "that no person or persons whatsoever, upon any contract, shall take directly, or indirectly, for loan of any monies, wares, merchandize, or other commodities whatsoever, above the value of 5*l.* for the forbearance of 100*l.* for a year, and so after that rate for a greater or lesser sum, or for a longer or shorter time; and that all bonds, contracts, and assurances whatsoever, made for payment of any principal, or money to be lent or covenanted to be performed upon or for any usury, whereupon or whereby there shall be reserved or taken above the rate of 5*l.* in the hundred as aforesaid, shall be utterly void." These restrictions, however, do not apply to contracts made in foreign countries; for on such contracts our courts will direct the payment of interest according to the law of the country in which such contract was made. (e) Thus *Irish, American, Turkish, and Indian* interest have been allowed in our courts to the amount of even 12*l.* per cent. For the moderation or exorbitance of interest depends upon local circumstances, and the refusal to enforce such contracts would put a stop to all foreign trade. (f)

Every security given upon an usurious consideration is so contaminated by it, that the statute of usury makes the security absolutely null and void; so that it cannot be enforced by law by any person, however innocent. Therefore it has been held, (g) that a bill of exchange, or a promissory note given upon an usurious consideration, is void, even in the hands of an indorsee for a valuable consideration without notice of the usury. But, by a recent statute of the 58 Geo. 3. c. 93. such bills of exchange are made valid in the hands of a *bona fide* indorsee for a valuable consideration, without notice of the usury between the original parties.

5. OF GAMING.] — Gaming is also prohibited by statute, though at common law the playing at cards, dice, &c. when practised innocently, and as a recreation, is lawful if it be not within the restriction of any statute. (h) But as the practice was found to encourage idleness and other vices, the statute 33 Hen. 8. c. 9. restrained it among the inferior sort of people. Gentlemen were, however, still left free to pursue it, until the 16 Car. 2. c. 7. by which it is enacted, that "if any person, by playing or betting, shall lose more than 100*l.* at one time, he shall not be compellable to pay his loss, and the winner shall forfeit treble the value; one moiety to the

(e) 1 P. Wms. 396.

(f) See *Stapleton v. Conway*, 3 Atk. 727. Fonbl. Treat. of Eq. bk. 5. c. 1. s. 6.

(g) *Lowe v. Waller*, Doug. 736. See also 1 Saund. 295. n. (1).

(h) 2 Vent. 175. *Bulling v. Frost*, 1 Esp. Rep. 255.

king, the other to the informer." This provision of the legislature was, however, soon found to be insufficient to its purpose: it was therefore enacted, by the stat. 9 Anne, c. 14. "that all bonds, and other securities, given for money won at play, or money lent at the time to play with, should be utterly void; that all mortgages or incumbrances of lands, made upon the same consideration, should be and enure to the use of the mortgagor, and that if any person at one time lose 10*l.* at play, he may, within three months, sue the winner, and recover it back by action of debt at law: and in case the loser does not, within the time limited, sue and prosecute, any other person may sue the winner for treble the sum so lost; and the winner is obliged and compellable to answer upon oath any bill or bills filed against him for discovering the sum or sums of money, or other thing, so won by him at play." Subsequent statutes have superadded further penalties to restrain this fashionable vice, "which," Sir *William Blackstone* observes, (i) "may shew that our laws against gaming are not so deficient as ourselves and our magistrates in putting these laws in execution." It is observable, that the stat. 16 Car. 2. declares, that the contract for money lost at play, and all securities given for it, shall be utterly void; but the stat. 9 Anne, confines itself to the securities for money won or lent at play. Upon which it has been determined, that though both the security and the contract are void as to money won at play, only the security is void as to money lent at play; and that the contract remains, and the lender may maintain his action for it. (k) And these acts having declared the security void, it may be observed, that a bill of exchange given for money won at play cannot be recovered upon, though in the hands of an indorsee for a valuable consideration, and who is totally ignorant of the circumstance affecting the security. (l)

6. STOCKJOBBER TRANSACTIONS.]—So, in order to prevent the pernicious and destructive practice of stockjobbing, it is enacted by the 7 Geo. 2. c. 8. (made perpetual by 10 Geo. 2. c. 8.) "That all contracts and agreements whatsoever which shall be made or entered into by or between any person or persons whatsoever, upon which any premium or consideration in the nature of a premium shall be given or paid for liberty to put upon, or deliver, receive, accept, or refuse any public or joint stock, or other public securities whatsoever, or any part, share, or interest therein, and also all wagers and contracts in the nature of wagers, and all contracts in the nature of putts and refusals, relating to the then present or future price or value of any such stock or securities, as aforesaid, shall be null and void to all

(i) 4 Bl. Com. 175.

(l) *Bowyer v. Hampton*, 2 Stra. 1155.

(k) Vide *Robinson v. Bland*, 2 Burr. 1080. *Barjeau v. Walmley*, 2 Stra. 1249.
Hussey v. Jacob, Com. Rep. 4.

intents and purposes whatsoever; and all premiums, sum or sums of money whatsoever, which shall be given, received, paid, or delivered, upon all such contracts or agreements, or upon any such wagers, or contracts in the nature of wagers, as aforesaid, shall be restored and repaid to the person or persons who shall give, pay, or deliver the same, who shall be at liberty, within six months from and after the making such contract or agreement, or laying any such wager, to sue for and recover the same from the person or persons to whom the same is or shall be paid or delivered, with double costs of suit, by action of debt founded on this act, to be prosecuted in any of his majesty's courts of record, in which action no essoin, protection, wager of law, or more than one imparlance shall be allowed; and it shall be sufficient therein for the plaintiff to allege that the defendant is indebted to the plaintiff, or has received to the plaintiff's use, the money or premium so paid or received, whereby the plaintiff's action accrued to him, according to the form of this statute, without setting forth the special matter."

Upon this statute it has been determined, (m) that where A., being employed as a broker for B. in stock-jobbing transactions, paid the differences for him, a dispute arising between them respecting the amount of A.'s demand, the matter was referred to C., who awarded 60*l.* to be due: on which A. drew on B. for 100*l.* part of the above, and indorsed the bill to C. after B. had accepted it: held, that C. could not recover on the bill. So, if a broker draw on his employer for differences paid for him in stock-jobbing transactions, and the employer accept the bill, and then the broker indorse it to a third person after it is due, the latter cannot recover on the bill. (n) But an agreement to sell out *omnia* to be afterwards replaced in stock is not within the above act. (o)

7. LOTTERY.]—All contracts or agreements for the sale of any tickets, or shares of tickets, or chances, in any private lottery; or, for the sale of any chances of tickets in any public lottery; and all insurances of numbers in any lottery, except by the holders of tickets in the public lottery, are prohibited by various statutes. (p)

8. WAGER POLICIES, &c.]—In order to prevent another species of gaming, called *wager policies*, or *insurances of interest or no interest*, the 19 Geo. 2. c. 37. s. 1. enacts, "that no assurance shall be made by any person or persons, on any ship or ships belonging to his majesty, or any of his subjects, or on any goods, merchandizes, or effects laden or to be laden on board of any ship or ships, *interest or no interest, or without further proof or interest than the policy*, or, by way of gaming or wagering, or, *without benefit of salvage to the insurer*; and that every such in-

(m) *Stears v. Lashley*, 6 Term Rep. 61.

(n) *Brown v. Turner*, 7 Term Rep. 630.

(o) *Oliverson v. Coles*, 1 Stark. 496.

(p) *Vide* 5 Geo. 1. c. 9. s. 45. 6 Geo. 2.

c. 35. 12 Geo. 2. c. 28. 22 Geo. 3. c. 47.

See also *Dery v. Shee*, 2 Term Rep. 617.

insurance shall be void to all intents and purposes." (g) And by the fourth section of this act, which was made to prevent *all re-assurances*, it is enacted, "that it shall not be lawful to make re-assurance, unless the assurer shall be insolvent, become a bankrupt, or die; in either of which cases, such assurer, his executors, administrators or assigns, may make re-assurance to the amount of the sum before by him assured; provided it shall be expressed in the policy to be a re-assurance. (r)

By the stat. 6 Geo. 1. c. 18. s. 12. it is enacted, that all policies of insurance upon ships at sea, made by any corporation (other than the two corporations therein mentioned) or by persons acting in partnership, shall be void. (s) So, all insurances upon *prohibited goods*, or relating to *contraband trading*, are void by the statutes 9 & 10 W. and M. c. 44. and 33 Geo. 3. c. 52. (t)

9. SMUGGLING, &c.] — *All contracts made in contravention of the revenue laws of this country are void.* Thus, where an agreement was made between two parties, (u) subjects of this country, for the sale and delivery of goods in *Guernsey*, for the purpose of being smuggled into *England*, it was holden, that the vendor could not maintain an action for the value of the goods. And in a subsequent case, (v) it was decided, that the circumstance of the vendor being an inhabitant of *Guernsey* would not alter the case, for he was still a subject of this country. So, where the defendant, an Englishman, living in *England*, contracted with the plaintiff, a foreigner, living at *Lisle*, for a quantity of lace, which the plaintiff knew was to be smuggled into *England*, and the plaintiff for that purpose had it packed in a particular manner by the direction of the defendant, for the more easy conveyance of it into *England* without a discovery, the Court held that the contract was void, and that the plaintiff could not recover the value of the goods. (w) But the merely selling goods, knowing that the buyer will make an illegal use of them, is not of itself sufficient to deprive the vendor of his right of payment; but to affect him it is necessary to show that he is either a sharer in the illegal transaction, or that he aided and assisted in the act of smuggling. Thus, in the case of *Holman v. Johnson*, (x) where it appeared that the plaintiff, residing at *Dunkirk*, sold and delivered a quantity of tea, for the price of which the action was brought, to the order of the defendant, knowing it was intended to be smuggled into *England*; but the plaintiff had no concern in the smuggling himself; it was held by the Court of King's Bench that this was a legal contract, and that an action might be supported on it: and Lord Mansfield, in giving judgment, lays it down,

(g) For the cases upon this stat. vide *Park on Insurance*, chap. 14.

(r) Ibid. chap. 15.

(s) Ibid. chap. 1.

(t) Ibid. chap. 12, 13.

(u) *Biggs v. Lawrence*, 3 Term Rep. 454. Vide post, Part II. tit. Sale of Goods, &c.

(v) *Clugas v. Penaluna*, 4 T. R. 466.

(w) *Waymell v. Reed*, 5 T. R. 599.

(x) Cowp. 341. See also *Hodgson v. Temple*, 5 Taunt. Rep. 181: Accord.

that if goods are sold abroad to be delivered in *England*, where they are prohibited, the contract is void, and the buyer shall not be liable to an action for the price, because it would be an inconvenience and prejudice to the state if such an action could be maintained." And accordingly, in a subsequent case of *Biggs v. Laurence*, (y) the defendant, who lived in *Cornwall*, sent an order to one of the plaintiffs, residing in *Guernsey*, who was a partner with three other plaintiffs, all living in *England*, for some brandy, which he directed to be delivered to the captain of a smuggling vessel, and some of the brandy was delivered at *Guernsey*, and the rest at sea; the whole being put by the partner at *Guernsey* into half-ankers, and ready slung for the purpose of smuggling, but it was brought into *England* at the risk of the defendant: the Court held that the action could not be supported.

So, where prohibited drugs were sold knowingly to be used in brewing, such sale was declared void: thus, in the case of *Langton v. Hughes*, (z) which was an action for goods sold and delivered by a druggist to a brewer, the seller knowing at the time of the sale that they were to be used in the brewery. The goods consisted of Spanish juice, isinglass, ginger, and other articles, the use of which by brewers is contrary to the provisions of 42 Geo. 3. c. 38., by which they are prohibited from using any thing but malt and hops in the brewing of beer. The Court held that the action could not be sustained.

10. TRADING TO THE EAST INDIES.] — By the stat. 7 Geo. 1. c. 21. s. 2, "All contracts made by His Majesty's subjects for loading any ship in the service of foreigners with a cargo to trade to the *East Indies*, are declared void." And therefore, to an action of debt on a bond, the defendant pleaded that it had been unlawfully agreed between the plaintiffs and the defendant, that the plaintiffs should sell and deliver to the defendant certain goods, to be shipped by the defendant in *London*, to be carried to *Ostend*, and there to be shipped on board other vessels to the *East Indies*. The Court determined, that the plaintiffs must be deemed principals in the transaction, and that the case was directly within the act of parliament. (a)

11. FORESTALLING, REGRATING, &c.] — Forestalling, regrating, and engrossing are treated by the law as offences against public trade, and are on that account illegal. Forestalling is described in the stat. 5 & 6 Edw. 6. c. 14., to be the buying or contracting for any merchandize or victual coming in the way to market, or dissuading persons from bringing their goods or provisions there, or persuading them to enhance the prices there; regrating, to be the buying of corn or other dead victual in any market, and selling it again in the same market, or within four

(y) 3 Term Rep. 454. Et vide Part II. (a) *Lightfoot v. Tenant*, 1 Bos. & Pul. 551. Vide 53 Geo. 3. c. 155., and Chitty

(z) 1 Maule & Selw. 593.

on Commerce, 1 vol. 666.

miles of the place; and engrossing, the getting into one's possession, or buying up, large quantities of corn or other dead victuals, with intent to sell them again. This statute was repealed by 12 Geo. 3. c. 71.; but forestalling, regrating, and engrossing are still offences at common law; and it has been decided that selling corn in sheaves is illegal, as being in effect forestalling the market. (b) But a sale of growing crops of corn or of hops is not contrary to law. (c)

12. SALE OF BRICKS.] — The stat. 17 Geo. 3. c. 42., which requires bricks for sale to be of certain dimensions, and gives a penalty for the breach of that regulation, was passed to protect the buyer against the fraud of the seller; bricks therefore sold and delivered under the statutable size unknown to the buyer, the seller cannot recover the value of them; for the policy of the act was to protect the buyer against the fraud of the seller, and this can only be done by holding that the latter shall not recover the value of such bricks so sold. (d)

13. TREATING AT ELECTIONS.] — By the statute 7 & 8 W. 3. c. 4. (which was made to prevent all species of bribery and corruption at elections for members of parliament,) it is enacted, "That no person after the teste of the writ to the sheriff, shall before his election, directly or indirectly, give, present, or allow to any person or persons having voice or vote in such election, any money, meat, drink, entertainment, or provision; or make any present, gift, reward, or entertainment; or shall at any time hereafter make any promise, agreement, obligation, or engagement, to give or allow any money, meat, drink, provision, present, reward, or entertainment, to or for any such person or persons in particular, or to any such county, city, &c., or to or for the use, &c. of any such person, in order to be elected, or for being elected to serve in parliament for such county, city, &c."

Upon this statute it has been holden, (e) that an innkeeper furnishing provisions for voters, at the request of a candidate, after the teste of the writ, cannot recover the expences of such provisions against the candidate. And non-resident voters are equally within the meaning of this act as resident voters. (f)

14. BANKRUPTS.] — All agreements by a bankrupt with a creditor to pay money, &c. for signing his certificate, are declared void by the stat. 5 Geo. 2. c. 30. s. 11., which enacts, "That every bill, note, contract, agreement, or other security whatsoever, to be made or given by any bankrupt, or by any other person, unto, or to the use of, or in trust for any creditor or creditors, or for the security of the payment of any debt or sum of money due from such bankrupt at the time of his becoming

(b) *Hadham's case*, 3 Inst. 197.

(c) *Bristol v. Waddington*, 2 New Rep. 555.

(d) *Law v. Hodson*, 11 East Rep. 300.
But see *Johnson v. Hudson*, Ibid. 180.

(e) *Ribbans v. Crickett*, 1 Bos. & Pul. 264.

See also the Bribery Act, 2 Geo. 2. c. 24.

(f) 1 Campb. Rep. 550. in notis.

bankrupt, or any part thereof, between the time of his becoming bankrupt and such bankrupt's discharge, as a consideration, or to the intent, to persuade him, her, or them to consent to or sign any such allowance or certificate, shall be wholly void and of no effect; and the monies thereby secured or agreed to be paid shall not be recovered or recoverable." (g)

15. SALE OF LIQUORS.]—By the statute 24 Geo. 2. c. 40. s. 12., (which was made for the purpose of preventing the *pernicious effects of dram-drinking and selling liquors in small quantities*,) it is enacted, "That no person or persons whatsoever shall be entitled unto, or maintain any cause, action, or suit for, or recover either in law or equity, any sum or sums of money, debt, or demands whatsoever, for or on account of any spirituous liquors, unless such debt shall have really been and *bonâ fide* contracted at one time, to the amount of 20s. or upwards; nor shall any particular article or item in any account or demand for distilled spirituous liquors, be allowed or maintained, where the liquors delivered at one time, and mentioned in such article or item, shall not amount to the full value of 20s. at the least, and that without fraud or covin."

But this statute does not extend to liquors purchased for the purpose of being sold again. (h)

(g) Vide *Smith v. Bromley*, Doug. 696. (h) Vide *Peake's case*, N.P. 180., *et vid. post*, Part II. tit. Sale of Goods.

CHAPTER V.

OF THE STATUTE OF LIMITATIONS, OR WITHIN WHAT TIME
AN ACTION UPON PROMISES MUST BE BROUGHT.

BY the statute 21 Jac. 1. c. 16. s. 3. it is enacted and declared, that “all actions *upon the case* (which comprehends contracts, agreements, and promises) other than such accounts as concern the trade of merchandize between merchant and merchant, their factors or servants, shall be commenced and sued within six years next after the cause of such action or suit, and not after. Nevertheless, if any person or persons, entitled to any of the said actions, shall be, at the time of any such cause of action accrued, within the age of twenty-one years, feme covert, *non compos mentis*, imprisoned, or beyond the seas, then such person or persons shall be at liberty to bring the same action, within such time as is before limited, after their coming to or being of full age, discover, of sane memory, at large, and returned from beyond the seas.” And by the statute 4 Ann. c. 16. s. 19. it is also declared, that, “if any person or persons *against* whom there shall be any such cause of suit or action for seamen’s wages, or any of the causes of action mentioned in the 21 Jac. 1., shall be, at the time of any such cause of suit or action accrued, beyond the seas, then the person or persons entitled to such suit or action, shall be at liberty to bring the said actions against such person and persons, after their return from beyond the seas, within such times as are respectively limited for the bringing of the said actions by this act, and by the said other act of 21 Jac. 1.”

Upon these statutes it has been determined, that if the plaintiff be in *England* when the cause of action accrues, though he afterwards go abroad, the time of limitation begins to run; so that if he or his representatives do not sue within six years, the statute is a bar. (a) And if one of several plaintiffs be abroad, and the others in *England*, the action must be brought within six years after the cause of action arises. (b)

It has also been determined, that the statute of limitations extends to persons in *Scotland*. (c) But if the plaintiff or defendant be abroad, or beyond the sea, at the time when the cause of action accrues, the statute will not begin to run till their return to this country. (d) And if

(a) 1 Wils. 134.

(b) 4 Term Rep. 516.

(c) 1 Bl. Rep. 286.

(d) 2 Stra. 836. Fitzgib. 81.

the plaintiff be a foreigner, and do not come to *England* for a great many years after the cause of action arises, he still has six years after his coming hither to bring his action. (e) And if he never come to *England* himself, he has always a right of action while he lives abroad; and after his death, his executors, or administrators are in the same situation. (f)

The statute cannot be a bar in any case, unless the time of limitation is expired after there has been a complete cause of action; as, if a man promise to pay ten pounds to J. S. when he comes from *Rome*, or when he marries; and ten years after, J. S. marries, or comes from *Rome*, the right of action accrues from the happening of the contingency, from which time the statute will begin to run, and not from the time of the promise. (g)

One of the objects of the statute of *James*, for limiting the period in which the action should be brought, was to protect persons from long protracted claims, when the vouchers and documents, and indeed all traces of evidence relating thereto might be lost, and the party left wholly undefended by the improper neglect of the claimant. Another more important object was to prevent the mischief which might happen in the commission of perjury in endeavouring to support and establish such dormant claims. As, however, many just claims may lie dormant either from negligence, or from particular causes with regard to the situation and circumstances of the parties, it has been determined, that if after the six years have elapsed, the party, upon whom the claim is made, either expressly promises or acknowledges the existence of the debt or contract, or promises to pay the debt or perform the contract, such acknowledgment or promise will take the case out of the statute, and entitle the party claiming to recover. And a conditional promise has been holden sufficient for this purpose, as well as an absolute one; as where the defendant said to the plaintiff, *Prove your debt and I will pay it.* (h) It was formerly doubted whether a mere acknowledgment of the debt, without a promise of payment, was sufficient to take the case out of the statute; such an acknowledgment being only considered as evidence of a promise; as in *trover*, where a demand and refusal are not holden to be a conversion, but only evidence of it. (i) To prevent the operation of the statute, it is, in general, necessary to prove an express acknowledgment of the existence of a debt. (k) And where a defendant having entered into a guarantie in writing, and become liable upon it at the period of more than six years before the com-

(e) 3 Wils. 145.

(f) Vid. Tidd's Prac. 16. 7 ed. where the cases on this statute are collected and digested.

(g) Godb. 437. 1 Lev. 48. 1 H. Bl. 651.

(h) 1 Ld. Raym. 389. 422. Carth. 470 12 Mod. 224.

(i) See Tidd's Prac. 21.

(k) Vide *Rowcroft v. Lomas*, 4 Maule & Sel. 457. 2 Bur. 1099. 5 Bur. 2650. Cowp. 548.

mencement of the suit, *verbally* promised, within six years, that the matter should be arranged; it was determined, that the statute of frauds having been once satisfied by the original promise being in *writing*, it was not necessary, in order to take the case out of the statute of limitations, that the latter promise should also be in *writing*. (k) If an agent has been employed to pay money for work done for the defendant, and the workmen are referred to him for payment, an acknowledgment or promise by him to pay will take the case out of the statute of limitations. (l) So, the admission of the wife, who was accustomed to conduct her husband's business, is sufficient to take the case out of the statute, in an action against the husband. (m) And, in an action against a husband, for goods supplied to his wife for her accommodation, while he occasionally visited her, a letter written by the wife, acknowledging the debt, within six years, was deemed admissible evidence for that purpose. (n) So, an acknowledgment by one of several drawers of a joint and several promissory note, will take the case out of the statute, as against any one of the other drawers, in a separate action on the note against him. (o) But where one of two joint drawers of a bill of exchange becomes bankrupt, and the indorsees proved a debt under his commission beyond the amount of the bill, for goods sold, &c., and exhibited the bill as a security they then held for their debt, and afterwards received a dividend; the Court held, in an action by the indorsees of the bill against the solvent partner, that the statute of limitations was a good defence, although the dividend had been paid by the assignees of the bankrupt partner within six years. (p)

If a letter be written by a defendant to the plaintiff's attorney, on being served with a writ, couched in ambiguous terms, neither expressly admitting nor denying the debt, it should be left to the jury to consider whether it amounts to an acknowledgment of the debt. (q) And if there be a mutual account of any sort between the plaintiff and defendant, for any *item* for which credit has been given within six years, that is evidence of an acknowledgment of there being such an open account between the parties, and of a promise to pay the balance, as to take the case out of the statute. (r) So, if a defendant admit the existence of a debt, which would otherwise be barred by the statute of limitations, but claim to be discharged by a written instrument, which does not amount to a legal discharge, he shall be bound by his admission. (s) And where the acceptor of a bill of exchange acknowledged his acceptance, and that he had been liable, but said that "he was not liable then because

(k) 1 Barn. & Ald. 690.

(l) 5 Esp. Rep. 145.

(m) 1 Holt, Ni. Pri. 591.

(n) 1 Campb. 394.

(o) Doug. 652, 3. 2. H. Bl. 540. But
see 1 Barn. & Ald. 463.

(p) 1 Barn. & Ald. 463.

(q) 2 Durnf. & East, 760.

(r) 6 Durnf. & East, 189.

(s) 6 Esp. Rep. 66.

it was out of date, and that he would not pay it, and that it was not in his power to pay it:" this was deemed sufficient to take the case out of the statute. (t) So, it is sufficient to prove, that upon a demand being made by a seaman on the owner of a ship, for wages which had accrued during an embargo, he said, "if others paid, he should do the same." (u) And a promise by a defendant in embarrassed circumstances, to pay a debt by instalments, if time were given him, is sufficient to take a case out of the statute. (v) But a note written by a debtor to an executor, "that the testator always promised never to distress him for the debt," is not evidence of a promise to pay it, made to the testator within six years. (w) And where the acknowledgment was, "I had the money, but the testatrix gave it to me;" the latter words were held to qualify the generality of the first admission, and not to amount to a new promise or confession of the defendant, sufficient to take it out of the statute. (x) So, where the defendant had said to the plaintiff, "I owe you not a farthing, for it is more than six years since;" the Court held, that this was not to be left to the jury, as evidence of an admission, to take a debt out of the statute of limitations. (y) In like manner a qualified admission, by a party who relies on an objection, which would at any time have been a good defence to the action, does not take the case out of the statute. (z) So, where a defendant on being applied to by the plaintiff's attorney, for the payment of a debt, wrote in answer, that he "would wait on the plaintiff, when he should be able to satisfy him respecting the misunderstanding which had occurred between them;" this was holden not to be such an acknowledgment of a debt, as to take the case out of the statute; and that such evidence ought not to be left to a jury, as ground to infer a new promise to pay. (a) So, in an action of *assumpsit* by an attorney, to recover his charges relative to the grant of an annuity, evidence that the defendant said, "he thought it had been settled when the annuity was granted, but he had been in so much trouble since, that he could not recollect any thing about it," was holden not to be a sufficient acknowledgment of the debt to take it out of the statute of limitations, and ought not to be left to the jury, as evidence of an admission of such debt, although the plaintiff proved his bill was not paid at the time of granting the annuity. (b) And where the defendant on being applied to for payment, said, "I think I am bound in honour to pay the money, and shall do it when I am able;" Lord Kenyon ruled, that it was a conditional promise only, and that the plaintiff was bound to shew that the defendant was of sufficient ability to pay. (c)

(t) 16 East, 420.

(u) 4 Campb. 185.

(v) 2 Stark. Ni. Pri. 98.

(w) 6 Taunt. 210.

(x) 6 Esp. Rep. 67, 8.

(y) 3 Taunt. 380.; and see 4 Maule & Sel. 457.

(z) 1 Stark. Ni. Pri. 7.

(a) 1 Holt, Ni. Pri. 380.

(b) 1 Mo. Rep. 340.

(c) 4 Esp. Rep. 36. But see 3 Stark. 99. in notis, semb. contra; and 2 H. Bl. 116.

If a cause of action, arising from the breach of a contract to do an act at a specific time, be once barred by the statute of limitations, a subsequent acknowledgment by the party, that he broke the contract, will not, it seems, take the case out of the statute. (*d*)

The exception in the statute of *James*, touching such accounts as concern trade of merchandize between merchant and merchant, their factors and servants, extends to those cases only where there are mutual accounts and reciprocal demands, and where such accounts are current and open, and not to accounts stated between them, (*e*) for no other actions are excepted but actions of account. (*f*) It has been supposed, that by the effect of the above exception, there can be no limitation to a merchant's open and unsettled account: this opinion, however, appears erroneous; for, if there is no item in the account, or an acknowledgment of the debt within six years, the statute will take effect; but if the last item of the account is within six years, that preserves all the preceding items from the operation of the statute. (*g*) And from these decisions it should seem, that merchants' accounts do not stand upon any better ground, in regard to the statute, than those of others. It should also be observed, that the exception extends to all merchants, as well inland as to those trading beyond sea. (*h*) And the effect of the exception has also been extended to other tradesmen, and persons having mutual dealings. (*i*) But in all these cases, the accounts must be mutual, with reciprocal demands on each side, and not as in the case of a tradesman and his customer, in the common way of business, where the items of credit are all on one side only. (*k*)

The statute of *James* does not begin to take effect till the cause of action is complete, and the party is capable of suing upon it; (*l*) as in the case of a consignee of goods for sale, no action lies for not accounting and returning the goods undisposed of until demand; and, therefore, the statute does not begin to run until the time of demand. (*m*) So, the statute begins to operate only from the time when a bill of exchange or promissory note, &c. is due, and not from the date. (*n*) It has been held, however, that notes payable on demand run from the date of the note, and not from the time of the demand. (*o*) So, where the cause of action is complete in the life time of the testator, the statute begins to run from that time, and not from the time of granting of the probate. (*p*)

The second provision in the statute of *James* relates to the plaintiff's being beyond sea. (*q*) But by 4 & 5 Ann. c. 16. s. 19., the effect of this

(*d*) 2 Campb. 160.; and see Peake's Evid. 205. 1 Barn. & Ald. 92.

(*e*) Bul. N. P. 149. Sir W. Jones, 401.

(*f*) Carth. 226. 2 Saund. 127. n. 6.

(*g*) 6 T. R. 189. 192.

(*h*) Vid. 2 Saund. 127. c. 2. Bl. Rep. 723.

(*i*) Peake, 127.

(*k*) 2 Saund. 127. b.

(*l*) Cro. Car. 159. 1 Lev. 48.

(*m*) 1 Taunt. 572.

(*n*) 1 H. Bl. 631. 5 Barn. & Ald. 214.

(*o*) 1 Selw. Ni. Pri. c. 4. s. 6.

(*p*) Willes' Rep. 27.

(*q*) Carth. 136. 226. 1 Show. 98.

provision is extended to the defendant's being beyond sea, at the time of the cause of action accruing. If therefore the defendant be abroad at the time of making the contract, he need not be sued until six years after his first return into this country. (r) The statute of limitations extends to persons absent in *Scotland*, (s) but not to those in *Ireland*; (t) the latter being considered as beyond the sea, within the meaning of the above provision; and foreigners living beyond the sea have the same advantage of the proviso as persons residing here. (v)

If the plaintiff be in *England* when the cause of action accrues, the time of limitation begins then to run, and a subsequent departure from the kingdom, and going beyond the seas, will not entitle the plaintiff, or his representative, to maintain an action after the expiration of the six years. (w)

(r) 2 Saund. 121. a. b.

(s) 1 Bl. Rep. 386.

(t) Per Holt Ch. J. 1 Show. 91.

(v) 2 Bl. Rep. 723.

(w) 1 Wils. 134.

THE LAW
OF
CONTRACTS. AND PROMISES.

PART THE SECOND.
OF THE SUBJECT MATTER OF CONTRACTS
AND PROMISES.

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PART THE SECOND.

CHAPTER I.

OF CONTRACTS FOR THE SALE OF GOODS, &c.

AS this chapter will necessarily embrace a great variety of subjects, I propose to consider them in the following order; viz.

1. OF THE GENERAL RULES OF LAW RELATING TO CONTRACTS FOR THE SALE AND DELIVERY OF GOODS; AND OF GAMBLING SPECULATIONS UNDER COLOUR OF A SALE OF GOODS.
2. OF THE STATUTE OF FRAUDS RELATING TO CONTRACTS FOR THE SALE OF GOODS.
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4. OF ABSOLUTE AND CONDITIONAL SALES, OR PARTICULAR STIPULATIONS ANNEXED.
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6. OF SALE AND RETURN.
7. OF SALE AND EXCHANGE.
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9. OF SALES BY AUCTION.
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11. WHEN THE PROPERTY IN GOODS SOLD IS VESTED IN THE BUYER; AND OF THE SELLER'S LIEN OR RIGHT TO STOP THEM *IN TRANSITU*.

12. OF THE SALE OF GOODS BY ASSIGNMENT OF A BILL OF LADING.
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15. OF THE SALE OF SMUGGLED GOODS, OR OF OBSCENE AND LIBELLOUS PRINTS, &c.
16. OF CREDIT, AND THE TIME AND MODE OF PAYMENT; AND IN WHAT CASES PAYMENT MAY BE RESISTED, OR THE CONTRACT PRICE REDUCED TO A *QUANTUM VALEBANT*.

1. OF THE GENERAL RULES OF LAW RELATING TO CONTRACTS FOR THE SALE OF GOODS; AND OF GAMBLING SPECULATIONS UNDER COLOUR OF A SALE.

In *Sheppard's Touchstone*, (a) the law is said to be, "that if a man by word of mouth sell to me his horse, or any other thing, and I give him or promise him nothing for it, this is void, and will not alter the property of the thing sold. But if one sell me a horse or any other thing for money, or any other valuable consideration, and the same thing is to be delivered to me at a day certain, and by our agreement a day is set for the payment of the money; or all or part of the money is paid in hand; or I give earnest-money (albeit it be but a penny) to the seller; or I take the thing bought by agreement into my possession, where no money is paid, earnest given, or day set for the payment: in all these cases there is a good bargain and sale of the thing to alter the property thereof; and in the first case, I may have an action for the thing, and the seller for his money: in the second case, I may sue for and recover the thing bought: in the third, I may sue for the thing bought, and the seller for the residue of the money: in the fourth case, where earnest is given we may have reciprocal remedies one against another; and in the last case the seller may sue for his money." Again it is said, in *Noy's Maxims*, (b) "If I sell my horse for money, I may keep him until I am paid; but I cannot have an action of debt until he be delivered; yet the property of the horse is by the bargain in the bargainor or buyer: but if he do presently tender me my money, and I do refuse it, he may take the horse, or have an action of detainment.

(a) Page 224.

(b) Page 88. See also 7 East Rep. 571.

And if the horse die in my stable between my bargain and the delivery, I may have an action of *debt* for my money ; because, by the bargain, the property was in the buyer." There is, however, this diversity, when the day of payment is limited, and when not : in the first case, the contract is good immediately, and an action lies upon it without payment ; but in the other not so : as if a man buy of a draper twenty yards of cloth, the bargain is void if he do not pay the money at the price agreed upon immediately ; but if the day of payment be appointed by agreement of the parties, in that case one shall have his action for the money, and the other for not delivering the cloth. (c) So, if two are agreed upon the price, and the buyer departs without tendering the money, and comes the next day and tenders it, the other may refuse ; for he is not bound to wait, unless a day of payment was agreed between them.' (d) And where A. having proposed to sell goods to B., gave him a certain time, at his request, to determine whether he would buy them or not ; B. within the time determined to buy them, and gave notice thereof to A. ; yet A. was not liable to an action for not delivering them ; for B. not being bound by the original contract, it was held there was no consideration to bind A. Thus, in the case of *Cooke v. Oxley*, (e) which was an action of *assumpsit* ; the declaration stated, that on, &c. a certain discourse was had, &c. concerning the buying of 266 hogsheads of tobacco ; and in that discourse the defendant proposed to the plaintiff that the former should sell and deliver to the latter the said 266 hogsheads (at a certain price) ; whereupon the plaintiff desired the defendant to give him (the plaintiff) time to agree to or dissent from the proposal till the hour of four in the afternoon of that day, to which the defendant agreed ; and thereupon the defendant proposed to the plaintiff to sell and deliver the same upon the terms aforesaid, if the plaintiff would agree to purchase them upon the terms aforesaid, and would give notice thereof to the defendant before the hour of four in the afternoon of that day ; the plaintiff averred that he did agree to purchase the same upon the terms aforesaid, and did give notice thereof to the defendant before the hour of four in the afternoon of that day ; he also averred that he requested the defendant to deliver to him the said hogsheads, and offered to pay to the defendant the said price for the same, yet that the defendant did not, &c. Upon this declaration the court determined, that the action could not be sustained, there being no consideration for the promise.

Lord *Kenyon* Ch. J. said, " Nothing can be clearer than that, at the time of entering into this contract, the engagement was all on one side ;

(c) Per curiam, Dy. 30. a.

(e) 3 Term Rep. 653.

(d) Bro. Contract, pl. 26. 5 Vin. Abr. 516.

the other party was not bound ; it was therefore *nudum pactum*." And, *Buller Just.* said : " It is impossible to support this declaration in any point of view. In order to sustain a promise there must be either a damage to the plaintiff, or an advantage to the defendant ; but here was neither when the contract was first made. Then as to the subsequent time, the promise can only be supported on the ground of a new contract made at four o'clock ; but there is no pretence for that. It has been argued, that this must be taken to be a complete sale from the time when the condition was complied with : but it was not complied with ; for it is not stated that the defendant did agree at four o'clock to the terms of the sale, or even that the goods were kept till that time."

But, it is said, (*f*) if a man agree to sell goods for so much as A. shall name, though the contract is not complete till A. names the price, yet if the vendor sell the goods to another before A. names the price, and A. afterwards name it, an action upon the case lies for the non-delivery of the goods. So, if A. sell cloth to B. for 10s., and B. takes away the cloth against the will of A., in this case A. shall have an action of trespass against B.; and if A. sell cloth to B. for 10s., in his election to make it a bargain or not, and, if he will, he may keep his cloth until the other pay him, and if A. say nothing, but doth suffer B. to take it away, he may make it a bargain if he will, and bring an action of *debt* for his money. (*g*) So, if I offer money for a thing in a market or fair, and the seller agree to take my offer, and whilst I am telling the money as fast as I can, he doth sell the thing to another ; or when I have bought it, we agree that he shall keep it until I can go home to my house to fetch the money ; in both these cases, especially in the first, the bargains are good, so as the seller may not sell them afterwards to another ; and upon the payment, or tender and refusal of the money agreed upon, I may take and recover the things. (*h*)

If goods are marked, or have the seal of the buyer upon them, whilst they are in the possession of the seller, the property is said to be vested in the buyer immediately, and remain in the possession of the seller only as a security for the price. (*i*) So it is said, (*k*) that if one sell me any thing by the tod, pound, bushel, yard, or ell ; it shall be reckoned according to the custom of the country or place where they are sold, and not according to the statute measures of other countries. But corn, by statute, (*l*) must now be sold throughout *England* by the *Winchester* bushel, and not otherwise.

If one sell me twenty barrels of ale, or ten bottles of wine ; by these bargains I shall not have the barrels or bottles with the ale or the wine.

(*f*) *Kit.* 181. a. See also *Com. Dig. tit. Agreement, A. 4.*

(*g*) *Shep. Touch.* 225.

(*h*) *Ibid.* See also *Greaves v. Ashlin*, 750. 5 *Campb.* 426.

(*i*) *Skin. Rep.* 647. *Holt's Rep.* 8.

(*k*) *Shep. Touch.* 225.

(*l*) 22 *Cár. 2. c. 8. s. 2.*; and see 4 *T.R.*

But upon the sale of a hogshead of wine, it seems by this bargain, that the buyer shall have the hogshead with the wine. (m)

OF GAMBLING SPECULATIONS, UNDER COLOUR OF A SALE.]—It has of late been the practice in the commercial world for persons to speculate upon the probable prices of particular articles of trade at a future day, and, like stockjobbing transactions, they have entered into time bargains, under the colour of a contract for the sale of goods, at a specified price payable on a particular day, without any intention either to buy or sell, but merely making it a gambling speculation; and on the arrival of the day mentioned in the contract, the parties settle and pay the difference between the market price of the day, and the fixed price mentioned in the pretended contract of sale. This species of speculation has, however, been recently brought before the courts of law, and we have seen, in a former chapter, (n) that all such contracts have been declared to be illegal.

2. OF THE STATUTE OF FRAUDS RELATING TO CONTRACTS FOR THE SALE OF GOODS.

Before the passing of the statute 29 Car. 2. c. 3., contracts and agreements were commonly entered into verbally, without any writing; but this giving rise, as appears by the preamble of that act, to many fraudulent practices, which were endeavoured to be upheld by perjury, and subornation of perjury, the legislature deemed it expedient, that certain contracts should be either reduced into writing and signed, or that some specific act should be done by the party to be charged with the contract; and accordingly, by the 17th clause of the above statute, it is enacted, “that from and after the 24th June 1677, no contract for the sale of any goods, wares, and merchandizes, for the price of 10*l.* sterling, or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part of payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized.”

As various questions have arisen upon different parts of this clause of the statute; and as numerous cases thereon are reported in our law books, it will be necessary to consider those parts according to the order in which they stand in the clause itself; and, 1st, of the contract and subject matter of it; 2dly, as to the amount of the price of the goods; 3dly, of the acceptance and receipt of the goods; 4thly, of earnest given to bind the bargain, or in part payment; and, lastly, of the note

(m) Shep. Touch. 225.

(n) Ante, 58.

or memorandum signed by the parties or their agents thereunto lawfully authorized.

1. OF THE CONTRACT, AND THE SUBJECT MATTER THEREOF.]—Upon the word *contract*, a distinction was formerly taken between *executory* and *executed contracts*; the *former* having been held not to be within the statute, but only the *latter*. Thus, in the case of *Towers v. Sir John Osborne*, (m) where the defendant ordered a chariot to be built; but when it was made he refused to take it; and in an action brought for the value, it was contended that the plaintiff should prove something given in earnest, or a note in writing, since there was no delivery. But the Chief Justice ruled this not to be a case within the statute of frauds, which relates only to contracts for the actual sale of goods, where the buyer is immediately answerable, without time given him by special agreement; and the seller is to deliver the goods immediately. And in another case of *Clayton v. Andrews*, (n) where the defendant agreed to deliver a certain quantity of wheat to the plaintiff within three weeks, or a month, from the said agreement, at a certain rate to be paid on delivery; which wheat was understood by both parties, at the time of making the agreement, to be unthrashed. No part of the wheat so sold was delivered; nor any memorandum thereof made in writing, nor any earnest given. And the question for the opinion of the Court was, whether this agreement was within the statute of frauds. Lord Mansfield held, upon the authority of the case just cited, that it was not within the statute. And Yates Just. said, “The seventeenth clause of the statute related only to executed contracts. Here wheat was sold to be delivered at a *future* time. It was *unthrashed* at the time when the contract was made; therefore it could not be delivered at that time. But in the case of *Rondeau v. Wyatt*, (o) this distinction was denied and overruled; though the decisions were supported upon other grounds. The action was brought for the non-performance of a special contract against the defendant, who was one of the proprietors of the *Albion Mill*, had entered into a verbal agreement to sell and deliver 3000 sacks of flour to the plaintiff to be put in sacks, which the plaintiff was to send to the mill, and shipped on board vessels to be provided by him in the river, on an express condition that the flour should be exported to foreign parts, from some port which the plaintiff was to open, and should not meet the defendant and the company again in the home market. In order to carry the scheme of exportation into effect, the plaintiff sent down to *Shoreham* in *Sussex* a large quantity of corn and flour merely to reduce, by collusion and a fictitious sale, the market-price to the level prescribed by act of par-

(m) Stra. 506.

(n) 4 Bur. 2101. See also 1 H. Bl. 20. S.P.

(o) 2 H. Bl. 63. See also *Cooper v. Elston*, *post*, 94. where the determination of this case was fully assented to by all the judges of the Court of King's Bench.

liament. (p) But this intended trick being discovered by government, the exportation was prevented, as the price was then very high, and an apprehension of a scarcity in this country prevailed. As the plaintiff, therefore, could not legally comply with the condition contained in the contract, the defendant refused to deliver the flour; and for such refusal the present action was brought, in which the plaintiff obtained a verdict, contrary to the opinion of Lord *Loughborough*, before whom the cause was tried, who thought that on grounds of public policy, but chiefly because the contract seemed to him to be within the statute of frauds, the plaintiff was not entitled to recover. A rule was therefore obtained calling upon the plaintiff to shew cause, why the verdict should not be set aside, and a non-suit entered. And, after the case had been fully argued at the bar, and the Court had taken time to consider, Lord *Loughborough* pronounced the judgment of the Court, that the objection made on that statute is well grounded, and therefore that the plaintiff ought to be non-suited. His Lordship observed, "that it had been said in the argument, that the statute does not extend to cases of executory contracts. Now it is singular that an idea could ever prevail that this section of the statute was only applicable to cases where the bargain was immediate, for it seems plain from the words made use of, that it was meant to regulate executory, as well as other contracts." The words are "No contract for the sale of any goods, &c." And, indeed, it seems that this provision of the statute would not be of much use, unless it were to extend to executory contracts; for it is from bargains to be completed at a future period, that the uncertainty and confusion will probably arise, which the statute was designed to prevent. The case of *Towers v. Osborne* was plainly out of the statute, not because it was an executory contract, as it has been said, but because it was for work and labour to be done, and materials and other necessary things to be found, which is different from a mere contract of sale; to which species of contract alone the statute is applicable. And in *Clayton v. Andrews*, (q) which was on an agreement to deliver corn at a future day, there was also some work to be performed, for it was necessary that the corn should be thrashed before the delivery. This, perhaps, may seem to be a very nice distinction, but still the work to be performed by thrashing, made, though in a small degree, a part of the contract."

In conformity to these decisions, it has been subsequently determined, that where the thing contracted for at the time of sale is not in *esse*, or is incapable of delivery and of part acceptance, such a contract is not within the statute of frauds. Thus, in the case of *Groves v. Buck*, (r) where it appeared, that a contract had been made for the

(p) 13 Geo. 3. c. 45. s. 5.

(r) 3 Maule and Sel. 178.

(q) Ante, 82.

sale of a quantity of oak pins, which, at the time of the sale, were not cut out of the slabs; Lord *Ellenborough* Ch. J. held, that such a contract was not within the statute, upon the ground that "the subject matter of the contract, at the time of making it, did not exist *in rerum natura*; and it was incapable of delivery and of part acceptance; and where that is the case, the contract has been considered as not within the statute of frauds." But where the thing contracted for is in a state of delivery at the time of sale, though at a considerable distance from the residence of the buyer; such a contract is within the statute, even though it be part of the contract, that the vendor shall deliver it at his own charge, in consideration of an additional price having been agreed upon between the parties. (s) So, it has been determined since the case of *Rondeau v. Wyatt*, that a contract for the sale of flour to be prepared by the sellers, who were millers, and to be afterwards shipped to the buyer, is within the statute; and if not in writing is void. And that it is not a mixed contract for the carriage and sale. And Mr. Justice *Bayley* in this case (t) observed, "that the nearest case to this, is *Clayton v. Andrews*. But that decision was, as it seems to me, corrected by the case of *Rondeau v. Wyatt*. This was substantively a contract for the sale of flour, and it seems to me immaterial, whether the flour was at the time ground or not. The question is, whether this was a contract for goods, or for work and labour, and materials found? I think it was the former; and if so, it falls within the statute of frauds."

Upon the subject matter of the contract, it has frequently been made a question whether shares of a company, or public stock, are comprehended under the words *goods, wares, and merchandizes*. But the point does not appear to have been finally settled; for in the case of *Pickering v. Appleby*, (u) which was an action of *assumpsit* for 580*l.* for ten shares in the stock of the governors and company of the *copper mines* in *England*, transferred and sold by the plaintiff to the defendant. There was no agreement or memorandum in writing of the contract, or any earnest paid. At the trial before *King*, Ch. J., it was doubted whether the shares in the stock of this company were within the purview and intent of the statute of frauds; and therefore it was made a case, and argued before the court of *Common Pleas*; and afterwards at *Serjeant's Inn* before all the judges of *England*. They, however, being divided in opinion, the question was adjourned. (v) But, in the case of *Mussell v. Cooke*, (w) where the plaintiff had agreed with one *Green*, the defendant's broker, for 5000*l.* *South-sea* stock, at 187*l.* *per cent.*, to be delivered about 10 days after; and on the day appointed, the plaintiff attended at the transfer office all day, but the defendant did not come, and the stock

(s) *Asley v. Emery*. 4 Maule & Sel. 262.

(t) Vide *Garbutt v. Watson*, 5 B. & A. 613.

(u) Com. Rep. 554.

(v) See 2 P. Wms. 508.

(w) Prec. in Ch. 535.

having in the mean time considerably risen, the defendant refused to transfer it; the plea of the statute was held by the Lord Chancellor, *Macclesfield*, to be good.

In a subsequent case, however, of *Colt v. Netterville*, (y) which turned not only upon the question whether stock came within the description of *goods*, &c. but also upon the circumstance of something having been given as *earnest*. It was a bill for a specific performance of an agreement for transferring some *York Buildings* stock, stating that the defendant had agreed to transfer it to the plaintiff on a particular day therein mentioned, on the plaintiff's paying the money, and that the plaintiff agreed to pay so much *per cent.* and to accept the transfer, and did thereupon pay to the defendant *6d. earnest*. To which bill the statute of frauds was pleaded, and the defendant denied that he received or accepted the *6d. as earnest*, and alleged that no part of the stock was delivered or note given; whereupon it was argued, on one side, that the *York Buildings*, and other stocks, were within the words and meaning of the statute of frauds, so as to require either part of the thing agreed to be sold to be delivered, or a note in writing, or money to be paid as earnest; for, first, that this clause of the statute expressly mentions contracts for the sale of any goods, or merchandizes, and that the word *goods* was of a very extensive signification. Secondly, that if one having stock should commit felony, this without question would be a forfeiture of his stock, a forfeiture to those who should have a grant of *bona felonum*, so that stock was within the words *bona*, or *goods*. Thirdly, at least it was within the word *merchandize*, for every vendible thing was merchandize; now stock was a thing vendible, and in the year 1720, was the most usual merchandize which people dealt in. On the other side it was contended, that whereas the statute enacts, that no contracts should be good for the sale of goods, wares, and merchandizes, of 10*l.* price, unless part of the goods be delivered, or earnest paid, or a note in writing; this showed that such goods were intended as were capable of an actual delivery, something that was corporeal, and not stock which was incorporeal, nor was there any such thing as *York Buildings* stock at that time.

The Lord Chancellor *King* said, "This question was before all the judges of *England*, who were equally divided upon it, six against six; and therefore it is a point too difficult for me to determine upon a demurrer." His lordship, however, said, that stock did not seem to be goods, wares, or merchandizes within the intent of the 17th clause. (z)

It has been determined, that standing crops, not severed from the

(y) 2 P. Wms. 307.

(z) Vide 5 Burr. 2589. & 1 East Rep. not money, but a new species of property.

1. where it is said, that public stock is

land, but ripe and fit to be gathered, when sold upon the terms of their being taken immediately, are to be deemed *goods* within the meaning of this part of the clause; for the advantage which they may derive from the soil during the short interval between the contract and removal, is merely accidental, and constitutes no part of the consideration. (a)

3dly, AS TO THE AMOUNT OF THE PRICE OF THE GOODS.] — Upon the words, “Of the price of 10*l.* sterling or upwards,” it has been held, that where several articles were ordered to the amount of 70*l.*, but no single article was of the price of 10*l.*, it is to be deemed one entire contract, and within this clause of the statute. Thus, in the case of *Baldry v. Parker*, (b) which was an action for goods sold and delivered; at the trial, it appeared in evidence that the plaintiffs were linen-drappers, and the defendant came to their shop and bargained for various articles. A separate price was agreed upon for each, and no one article was of the value of 10*l.* Some were measured in his presence; some he marked with a pencil; others he assisted in cutting from a larger bulk. He then desired an account of the whole to be sent to his house, and went away. A bill of parcels was accordingly made out and sent by a shopman. The amount of the goods was 70*l.* The goods were afterwards sent to the defendant's house, and he refused to accept them. The plaintiffs were nonsuited; and the Court, after argument, determined that the nonsuit was right. And Abbott Ch. J. said, “The first question is, whether this was one entire contract for the sale of all the goods? By holding that it was not, we should entirely defeat the object of the statute; for then persons intending to buy many articles at one time, amounting in the whole to a large price, might withdraw the case from the operation of the statute, by making a separate bargain for each article. Looking at the whole transaction, I am of opinion that the parties must be considered to have made one entire contract for the whole of the articles. The plaintiffs, therefore, cannot maintain this action, unless they can show that the case is within the exception of the 17th section, the words of which are peculiar; ‘except the buyer shall accept part of the goods so sold, and actually receive the same.’ It would be difficult to find words more distinctly denoting an actual transfer of the article from the seller, and an actual taking possession of it by the buyer. If we held that such a transfer and acceptance were complete in this case, it would seem to follow as a necessary consequence, that the vendee might maintain trover without paying for the goods, and leave the vendor to this action for the price. Such a doctrine would be highly injurious to trade, and it is satisfactory to find that the law warrants us in saying that this transaction had no such effect.”

(a) *Parker v. Staniland*, 11 East Rep. 362. *Warwick v. Bruce*, 2 M. & S. 205.

(b) 2 Barn. & Cres. 37.

3. OF THE ACCEPTANCE AND RECEIPT OF THE GOODS.] — If a contract for the sale of goods is not reduced into writing, then there must be either an acceptance and receipt of the goods in whole or in part, or earnest given, or part payment. The contract should be complete, and there must be not only an acceptance, but a change of possession. An actual delivery, however, is not in all cases necessary; for the thing contracted to be sold may be virtually delivered; and such virtual delivery will be equally effectual to supersede the necessity of writing and signing; as, for instance, if the goods sold are ponderous, and not capable of actual delivery; but the buyer so far accepts them as to exercise a right over them, either by disposing of the goods, or by giving orders and directions respecting them as owner; these acts may countervail the *actual* delivery, and vest the property in the buyer, without any written contract or earnest paid. Thus, in the case of *Searle and Others v. Keeves*, (c) which was an action of *assumpsit* for the non-delivery of rice; and at the trial it was proved, that on the 26th of September one of the plaintiffs had been at the house of the defendant, who told him that he had a quantity of rice to sell; but there was no evidence of any contract made at that time; the plaintiffs, however, produced an order on *Bennet and Co.*, the warehousemen, to deliver to them 20 barrels of rice, which was signed by *Keeves*; and it was also proved, that *Keeves* had told them that he had sold 20 barrels of rice to Mr. *Searle*, at 17s. per hundred, and that he was a fool for selling it so soon, as the price of rice had advanced. The rice not being then taken away, *Keeves*, on the 2d of October, countermanded the delivery, in consequence of which *Bennet and Co.* refused to deliver the rice to the plaintiffs, who sent for it on the 10th of October following. The counsel for the defendant contended, that as to this count the plaintiffs ought to be nonsuited: they said that the statute of frauds, in all cases of sales of goods, required a note in writing specifying the terms of the contract; and being meant to guard against fraud in contracts, made it necessary to specify particularly what the terms of the sale were: in this case there was no specification of the terms; the only evidence was, the order for the delivery by the defendant, which did not specify any thing as to the price, so that it was not a sufficient note in writing under the statute. But *Eyre Ch. J.* said, "The statute of frauds does not attach where there has been earnest or a delivery of part of the things sold; I think there has been in this case a delivery of the whole. *Keeves*, the defendant, gave an order for the delivery upon *Bennet and Co.*, in whose possession the rice then was; this satisfies the statute, and the plaintiffs are entitled to recover."

And in a subsequent case (d) it has been held, that it is not necessary

(c) 2 Esp. Rep. 598. See also *Hinde v.* (d) *Harman v. Anderson*, 2 Campb. 243. *Whitehouse*, post, 94.

there should be an actual transfer made in the wharfinger or warehouseman's books; but the lodging of the delivery order is deemed sufficient.

So, in the case of *Chaplin v. Rogers*, (c) which was an action for goods sold and delivered; and the case proved was, that the parties being together in the plaintiff's farm-yard, the defendant, after some objections and doubts upon the quality of a stack of hay (particularly the inside part) then standing in the yard, agreed to take it at 2s. 6d. per hundred weight. Soon after he sent a farmer to look at it, whose opinion was unfavourable. But about two months afterwards another farmer, of the name of *Loft*, agreed with the defendant for the purchase of some of this hay, still standing untouched in the plaintiff's yard, and the defendant told *Loft* to go there and ask what condition it was in, saying he had only agreed for it, if it were good. The plaintiff having informed *Loft* it was in a good state, he agreed to give the defendant 3s. 9d. per hundred weight for it, the defendant having told him that he had agreed to give the plaintiff 3s. 6d. for it. *Loft* thereupon brought away 36 hundred weight; but this latter fact was without the knowledge and against the direction of the defendant. At the trial, the learned judge left it to the jury to decide whether, under the circumstances, there had been an acceptance by the defendant; and they found that there had been, and gave 50*l.* damages, being the value of the hay at the price agreed for. A rule *nisi* was obtained, calling on the plaintiff to show cause why the verdict should not be set aside, and a new trial had, on the grounds that the learned judge had left that as a question of fact to the jury which he himself ought to have decided, as an objection in point of law arising on the statute of frauds; and because the evidence did not warrant the verdict. But the Court decided that there was sufficient evidence of a delivery to, and acceptance by the defendant to leave to the jury; and therefore discharged the rule. And Lord *Kenyon* Ch. J. said, "It is of great consequence to preserve unimpaired the several provisions of the statute of frauds, which is one of the wisest laws in our statute book. My opinion will not infringe upon it; for here the report states that the question was specifically left to the jury whether or not there were an acceptance of the hay by the defendant, and they have found that there was, which puts an end to any question of law. I do not mean to disturb the settled construction of the statute, that in order to take a contract for the sale of goods of this value out of it, there must either be a part-delivery of the thing, or a part-payment of the consideration, or the agreement must be reduced to writing in the manner therein specified. But I am not satisfied in this case that the jury have not done rightly in finding the fact of a delivery: where

(c) 1 East, 192.

goods are ponderous, and incapable, as here, of being handed over from one to another, there need not be an actual delivery; but it may be done by that which is tantamount, such as the delivery of the key of a warehouse in which the goods are lodged, or by delivery of other *indicia* of property. Now here the defendant dealt with this commodity afterwards as if it were in his actual possession, by selling part of it to another person."

But it seems doubtful, whether, in a case where the thing sold is capable of immediate delivery, as a horse, the circumstances of striking the bargain, according to a vulgar custom in *Yorkshire*, by the buyer passing the edge of a shilling over the seller's hand, and returning it into his own pocket, and a verbal admission of the bargain, coupled with the buyer's offering it for sale, is sufficient to satisfy the statute, without either a delivery or payment of the earnest money. (f)

And in the case of *Anderson v. Scot*, (g) which was an action for the non-delivery of wines sold to the defendant, it appeared in evidence that the wines, at the time of sale, were lying in the cellars of the vendor, and the buyer selected particular pipes, and ordered the spills or pegs, by which the wine is tasted, to be cut off, and his initials to be put upon the pipes, which was accordingly done; the buyer also took the guage-numbers of each pipe. Lord *Ellenborough* Ch. J. held this to be a sufficient acceptance and delivery to satisfy the statute. So, in *Hodgson v. Le Brett*, (h) where a quantity of linen and other articles had been purchased at a shop, and the buyer wrote her name upon the linen only, the same learned judge held, that the statute was satisfied as to the linen, but not as to the other articles.

And in *Elmore v. Stone*, (i) where the purchaser of two horses, having neither servant nor stable, told the seller, who kept a livery-stable, that he must keep them for him; and accordingly the seller removed them out of his sale-stable into another stable; it was held a sufficient acceptance and delivery within the statute. But in *Carter v. Toussaint*, (k) where a race-horse was sold by a verbal contract, but no time was fixed for the payment of the price, and it was agreed that the horse should be kept by the plaintiffs for 20 days without any charge. At the expiration of the 20 days the horse was, by the directions of the defendant, taken by a servant of the plaintiffs to *Kimpton Park*, for the purpose of being turned out to grass there; and it was there entered in one of the plaintiffs' names at the request of the defendant, who was anxious that it might not be known that he kept a race-horse. The defendant, however, afterwards refused to take the horse. The Court determined, that there was no acceptance of the horse to satisfy the words of the statute. And

(f) *Blenkinsop v. Clayton*, 1 Mo. Rep. 328. 7 Taunt. S. C.

(g) 1 Campb. Rep. 235. n.

(h) 1 Campb. Rep. 233.

(i) 1 Taunt. 458.

(k) 5 Barn. & Ald. 855.

Holroyd Just. observed, " Here there was no change of possession, as in the case of *Elmore v. Stone* ; and the case would be different if the horse had been entered at the park in the name of the defendant."

So, in the case of *Tempest v. Fitzgerald*, (1) where a horse had been purchased for ready money, and the buyer requested the seller to keep it in his stables for a certain time, and gave directions as to its treatment. The horse, however, died before the buyer had either paid the price, or taken it away. The Court held, that there was no acceptance within the words of the statute. And *Abbott* Ch. J. said, " The statute of frauds was made for wise and beneficial purposes, and ought to receive such a construction as will best accord with the plain and obvious meaning of the legislature. The word *accepted* imports not merely that there should be a delivery by the seller, but that each party should do something by which the bargain should be bound. I do not mean, however, to say, that if the buyer were to take away the goods without the assent of the seller, that would not be sufficient to bind him. In this case, payment of the price was to be an act concurrent with the delivery of the horse ; at any rate there is nothing to show that either party understood that the one was to precede the other. The defendant, therefore, had no right of property in the horse, until the price was paid ; he could not then exercise any right of ownership. If he had at that time rode away with the horse, the plaintiff might have maintained trover." *Holroyd* Just. said, " That the object of the statute of frauds was to remove all doubts as to the completion of the bargain ; and it therefore requires some clear and unequivocal acts to be done in order to show that the thing had ceased to be *in fieri*. Those acts are, either that the buyer shall accept part of the goods sold, and receive the same, or give something in earnest or in part payment, or that the contract be reduced to writing. These are all acts that clearly and unequivocally show that the bargain is executed."

So, in the case of *Howe v. Palmer*, (m) where the defendant had verbally agreed with an agent of the plaintiff for the purchase of twelve bushels of tares, (then constituting a part of a larger quantity in the plaintiff's possession,) which were to remain in the vendor's possession till called for ; and the plaintiff's agent, on his return home, had measured the twelve bushels, and set them apart for the vendee ; the Court determined, that this did not amount to an acceptance within the statute ; and they distinguished this case from that of *Elmore v. Stone*, because in that case an expence had been incurred by the seller on account of the buyer, and by his direction ; and that was considered

(1) 3 Barn. & Ald. 680.

(m) 3 Barn. & Ald. 321. See also *Atley v. Emery*, ante, 84.

evidence of acceptance on the part of the buyer. And Mr. Justice *Bayley*, in referring to the case of *Elmore and Stone*, said, "That case goes as far as any case ought to go; and I think we ought not to go one step beyond it; and I must say, that I doubt the authority of that decision."

So, in the case of *Price v. Lea*, (n) where a contract was made for the sale of two different articles, one of which was agreed upon as to quantity, quality, and price; but for the other the buyer offered a price, which the traveller of the seller did not think himself warranted in taking, but said he would write to his principal, and if he (the buyer) did not receive a letter in one or two days, refusing to execute the order, he might conclude that his offer was accepted. The traveller did not write, but sent both articles. The buyer accepted and tendered the price of the first article, but refused to accept or pay for the other. And in action brought for the price of both articles, the defendant pleaded a tender of the price of the first article, and *non-assumpsit* to the other. The Court determined, that the buyer was not liable for the last parcel. And *Holroyd* Just. said, "A contract for the first article was made between the defendant and the traveller; but the agreement for the residue cannot be considered as complete until the time allowed to the plaintiffs for deliberation had expired; there was not then one entire contract for both the articles, so as to make the acceptance of one the acceptance of the whole."

It is now settled, that a delivery without an *ultimate acceptance*, and such as completely affirms the contract, is not sufficient to satisfy the words of the statute.

This was determined in the case of *Kent v. Huskinson*, (o) which was an action of *assumpsit* for goods sold and delivered, tried before Lord *Alvanley*, Ch. J. The subject of the action was a bale of sponge sent by the plaintiff, a wholesale dealer in that article, residing in London, to the defendant, a retail dealer residing in Staffordshire. Some short time before the sponge was sent by the plaintiff, he had been at the place where the defendant resided, and had received from him a verbal order, under which he had acted in sending the sponge, and the price charged was 11s. per pound, amounting altogether to 75l. Soon after the sponge was sent, the defendant wrote the following letter to the plaintiff: "After receiving a letter from your house in town, stating the bale of sponge was sent by your direction, I called on a friend or two who are competent judges of the article, and asked them to say, according to the present price of sponge, what it was worth; the answer was, not more than six shillings per pound; have therefore returned it to you by the same conveyance it was forwarded by

(n) 1 Barn. & Cres. 156.

(o) 3 Bos. & Pul. 233.

to this place. In future will select what sponge I may want personally, otherwise will appoint some confidential friend for that purpose." The plaintiff's son being at the defendant's house soon after the sponge was returned, was told by him that he had resolved not to keep the article, because it was not so good as he had expected. It was objected for the defendant, that inasmuch as this was a contract for the sale of goods of more than ten pounds value, the case fell within the 17th section of the statute of frauds, for want of a note or memorandum in writing, and consequently the plaintiff could not recover. His lordship being of this opinion, nonsuited the plaintiff. A motion, however, was afterwards made for a rule to show cause why the nonsuit should not be set aside. But the Court were clearly of opinion, that the case was within the statute, and therefore refused the rule. And his lordship said, "How is any judgment to be formed as to the nature of the contract between these parties? Possibly the order was for the best, possibly for the second best sponge, or sponge of some peculiar quality; all which circumstances are left in a state of uncertainty. It was this very uncertainty, and the frauds to which it might lead, that the statute had in contemplation, and meant to guard against. The only affirmance of any contract to be collected from the evidence is an affirmance of some sort of order for some sort of sponge; and it appears that the moment the article reached the defendant and was examined, he sent it back to the plaintiff, saying it was not that sort of sponge which he wanted and had ordered. The defendant's letter cannot, as it appears to me, be construed into any thing like an acceptance, so as to bring this case within the exception which has been relied on." And *Heath Just.* said, "According to the words of the statute, the exception does not apply, unless the vendee both receive and accept. Now that acceptance I cannot consider to be any other than *the ultimate acceptance, and such as completely affirms the contract*. What the nature of this order was, or under what circumstance it was given, was not proved. Possibly the sponge was sent down upon speculation only."

A parol dispensation of the written terms as to the periods of delivery, is not affected by the statute, where the original contract was made conformably to it. This was determined in the case of *Cuff v. Penn*, (p) where it appeared, that the defendant had agreed, by a written contract, to purchase of the plaintiff 300 hogs of bacon, to be delivered at fixed times, and in specified quantities; and after part of the bacon had been delivered to the defendant, he requested the plaintiff, as the sale was dull, not to press the delivery of the residue, to which the plaintiff assented; and on the defendant afterwards refusing to accept

(p) 1 Mau. & Sel. 21.

the rest of the bacon, the plaintiff brought an action for the non-acceptance; and it was objected that the action would not lie; for that the alteration of the agreement could neither vary the contract, nor substitute a new one in its place, as it would be void by the statute of frauds; there being neither a part acceptance, nor a part payment under it. The Court, however, held it to be a mere parol dispensation of the terms of the original contract in respect to the times of the delivery; and therefore that it was not affected by the statute of frauds.

The question of acceptance and receipt of the goods, is a mixed question of law and of fact; and must, like all other cases, as far as regards the fact, be left to the jury. (q)

If goods are ordered verbally by a trader in the country, of a merchant in *London*, the delivery of them by the vendor to a carrier is a sufficient delivery to satisfy the statute, where the buyer has been accustomed to receive goods from the vendor by the same conveyance. (r) But, in the case of *Hanson v. Armitage*, (s) which was an action for the price of two chests of tea. At the trial before *Abbott Ch. J.*, it appeared in evidence, that the plaintiffs, tea dealers in *London*, had been in the habit of shipping teas to the defendant, who was a grocer, resident at *Barnsley* in *Yorkshire*. The usual course was to deliver the tea at the wharf of one *Staunton* in *London*, to be forwarded by the first ship; and several parcels of tea, sent in this manner, had been paid for by the defendant. On the 3d *June* 1820, the plaintiffs delivered at *Staunton's* wharf, two chests of tea to be forwarded to the defendant in the usual manner. The vessel in which this tea was shipped was lost on her voyage. The plaintiffs, on the 10th of *June*, transmitted by post to the defendant an invoice of the tea, and on the 13th the defendant returned the same by post, and stated "that he had nothing to do with it, as he had heard of the loss of the ship before the invoice arrived, and that he would not take to the account." His lordship directed the jury that they might fairly presume that the defendant had given a parol order for the tea, and stated that he would reserve the question for the opinion of the Court, whether the delivery of the tea, and the acceptance of it by the wharfinger, for the purpose of transmitting it by the usual conveyance, was to be deemed an acceptance by the buyer within the meaning of the 29 Car. 2. c. 3. s. 17. They accordingly found a verdict for the plaintiffs. And after argument, the Chief Justice said, "The Court are of opinion, that the acceptance in this case, not being by the party himself, was not sufficient; and he referred to the case of *Howe v. Palmer*, (t) where it was held, that there could be no actual acceptance, so long as the buyer continued to have a right to object either to the quantum or quality of the goods."

(q) *Blenkinsop v. Clayton*, 1 Mo. 328.

(r) *Hart v. Sattley*, 3 Campb. 528.

(s) 5 Barn. & Ald. 557. And see *Astley v. Emery*, 4 M. & S. 262.

(t) Ante, 90.

Upon a *sale by sample*, it has been determined, that if the delivery of a sample of goods from the bulk be considered and received as part of the bulk bought, this is a sufficient acceptance within the meaning of the statute. But unless it is so stipulated, it is not to be deemed as part of the bulk. Thus, in the case of *Hinde v. Waterhouse*, (t) which was an action upon a sale of sugar by public auction. The sugar was sold in hogsheads, and out of each hogshead was taken half a pound as a sample; but such sample, by the terms and conditions of sale, was so far treated as a part of the entire bulk delivered, that it was considered in the original weighing as constituting a part of the bulk actually weighed out to the buyer, and allowed for specifically, if he should chuse to have the commodity reweighed. Lord *Ellenborough* Ch. J. said, "I cannot but consider the sample as part of the goods sold under the terms of the sale, accepted and actually received as such by the buyer. And although it be delivered partly *àlio intuitu*, namely as a sample of quality, it does not therefore prevent its operating to another consistent intent, also in pursuance of the purpose of the parties, as expressed in the conditions of sale, namely, as a part delivery of the thing itself, as soon as in virtue of the bargain the buyer should be entitled to retain, and should retain it accordingly. And the Court are of opinion, that the sample must be considered as part of the goods sold.

But in the case of *Cooper v. Elston*, (u) which was an action of *assumpsit*, brought to recover the damages sustained by the plaintiff in consequence of the defendant's not delivering 50 quarters of wheat pursuant to his contract with the plaintiff. And the facts were as follow: The defendant on the 4th of July 1795, at *Nottingham*, sold to the plaintiff by sample 50 quarters of wheat at 4 guineas per quarter: the wheat to be delivered by the defendant to the plaintiff at *Gainsborough*. Two days afterwards the defendant delivered to the plaintiff at *Nottingham* the sample by which he had sold the wheat to him; but such sample was no part of the 50 quarters to be delivered at *Gainsborough*. No money was paid by the plaintiff to the defendant on account of the wheat; nor was there any memorandum in writing signed by the parties. The defendant afterwards refused to deliver the wheat. The Court were of opinion that this case came within the 17th section of the statute; and therefore judgment was given for the defendant. And Lord *Kenyon*, Ch. J. said: "After this question has been afloat so long in the courts, I am glad that by the very able decision of the Court of Common Pleas, in the case of *Randean v. Wyatt*, the construction of this clause of the statute of frauds is brought back to the manifest intention of the legislature in making that provision. To the authority.

(t) 7 East Rep. 558. See also *Klinitz v. Surrey*, 5 Esp. 267.

(u) 7 Term Rep. 14. See also *Alexander v. Comber*, 1 H. Bl. 20. S. P., and *Tuber v. West*, Holt's Ni. Pri. Rep. 179.

of that case I entirely subscribe, and, in my opinion, it governs the present. The doctrine which was laid down in *Clayton v. Andrews*, (v) as to executory contracts not being within the statute, was taken from *Towers v. Osborne*. (w) I will not pretend to say that those cases were not rightly decided upon their particular circumstances. The latter was a mere contract for work and labour; the thing contracted for did not exist at the time. In the former, also, something was required to be done in order to put it in the state in which it was contracted to be sold. But at any rate I am at a loss to discover how this can be called an executory contract for the sale of the goods in question. The thing sold existed *in solido* at the time of the contract of sale. I am not able to distinguish this case from that of *Randean v. Wyatt*; and the grounds and principles of that decision are so amply detailed in the report of it, that it is unnecessary to add any thing more. With respect to this coming within one of the exceptions of the statute on account of the acceptance of the sample; there is no pretence for it, for the case expressly states, that the sample was no part of the goods contracted to be delivered."

3. OF EARNEST GIVEN TO BIND THE BARGAIN, OR OF PART PAYMENT.] — It is observed, (x) "that where part of the price is paid down, if it is but a penny, or any portion of the goods is delivered by way of earnest, it is binding. The thing given as earnest need not be money, but may be any other symbol, as a ring or glove, &c. But to constitute earnest, the thing given should be expressed by the buyer, to be as a token of ratification of the contract. But it seems, that what is termed in *Yorkshire* striking the bargain with a shilling, that is, for the buyer merely to draw the edge of the shilling over the hand of the vendor; is not sufficient to satisfy the statute of frauds, either as earnest or part payment.

4. OF THE NOTE OR MEMORANDUM SIGNED BY THE PARTIES OR THEIR AGENTS THEREUNTO LAWFULLY AUTHORIZED.] — The note or memorandum required by the statute need not be drawn up in any particular form of words. It may be contained in a letter, or other writing referred to by letter: but in whatever form the writing may be, the contract must be certain, and it must also be signed with the name of the party to be charged therewith, or his agent lawfully authorized; otherwise the contract will be void. (y) Thus, in the case of *Egerton v. Matthews* and another, (z) which was an action on the case against the defendants for not accepting and paying for certain goods, which they had contracted to purchase by the following memorandum in

(v) Ante, 82.

(w) Ibid.

(x) 2 Bl. Com. 447.

(y) Vide Roberts on the stat. of frauds, 105 to 120.

(z) 6 East. 307.

writing: "We agree to give Mr. *Egerton* 19*d.* per pound for 30 bales of *Smyrna* cotton, customary allowance, cash 3 per cent. as soon as our certificate is complete. (Signed) *Matthews* and *Turnbull*, and dated 2*d* of *Sept.* 1803." At the trial, before Lord *Ellenborough* Ch. J. it was objected on the authority of *Wain v. Warlters*, (a) that the contract being altogether executory, and no consideration appearing on the face of the writing for the promise, nor any mutuality in the engagement, it was void by the statute of frauds. And it not being at the time adverted to that the case cited turned upon the meaning of the word *agreement* (i. e. to pay the debt of another) in the 4th clause of the statute, and that this case was governed altogether by the 17th clause, the object and wording of which is different, and which has not the word *agreement*, the plaintiff was nonsuited. But on a motion for setting aside the nonsuit, when the attention of the court was called to the difference of the two clauses, Lord *Ellenborough*, on granting a rule *nisi*, expressed his assent to the distinction between the two cases, and said, that the nonsuit had proceeded upon a mistake at the trial in supposing that they were the same. And, at a subsequent day, on showing cause against the rule, the Court determined that the case did not come within the statute, though the contract was not signed by the seller. And his lordship observed, "that the words of the statute were satisfied if there were some note or memorandum in writing of the bargain signed by the parties to be charged by such contract." And this was a memorandum of the bargain, or at least of so much of it as was sufficient to bind the parties to be charged therewith, and whose signatures to it is all that the statute requires." So, where an order was given for a quantity of goods, and a bill of parcels with the vendor's name printed thereon delivered at the same time to the buyer, a subsequent letter written and signed by the vendor, referring to the order, was connected with the bill of parcels, so as to raise a sufficient contract in writing within the 17th clause of the statute. Thus, in the case of *Saunderson v. Jackson* and another, (b) which was an action on the case against the defendant for not delivering 1000 gallons of gin to the plaintiff within a certain time, according to a bargain entered into between them. There was a second count for not delivering within a reasonable time. At the trial, the contract for the delivery of the gin having been proved on the part of the plaintiff, the defendants insisted that the case was within the statute of frauds, inasmuch as there was no note or memorandum in writing of the bargain. The circumstances were as follow; At the time the order for the gin was given by the plaintiff to the defendants, a bill of parcels was delivered to the former, the printed part of which was "*London*."

(a) 5 East, 10. Et vide post, ch. 2.

9 Ves. jun. 351. *Coles v. Trecothick*, ibid.

(b) 2 Bos. & Pul. 238. 5 Esp. Rep. 251.

180. S.C. See also *Fowle v. Freeman*,

Bought of *Jackson and Hankin*, distillers, No. 8, *Oxford Street*," and then followed in writing, "1000 gallons of gin, 1. in 5. gin 7s. 350^l." About a month after the above period the defendants also wrote the following letter to the plaintiff, "Sir, we wish to know what time we shall send you a part of your order, and shall be obliged for a little time in delivery of the remainder; must request you to return our pipes. We are, your humble servants, *Jackson and Hankin*." On this evidence his lordship directed the jury to find a verdict for the plaintiff, reserving the point made for the consideration of the Court. When the case came on for argument, the Court were of opinion, that it was not within the statute: And Lord *Eldon* Ch. J. said, "This bill of parcels, though not the contract itself, may amount to a note or memorandum of the contract within the meaning of the statute. The single question therefore is, whether if a man be in the habit of printing instead of writing his name, he may not be said to sign by his printed name, as well as his written name? At all events, connecting this bill of parcels with the subsequent letter of the defendants, I think the case is clearly taken out of the statute of frauds. For although it be admitted that the letter which does not state the terms of the agreement would not alone have been sufficient, yet as the jury have connected it with something which does, and the letter is signed by the defendants, there is then a written note or memorandum of the order, which was originally given by the plaintiff, signed by the defendants. It has been decided that if a man draw up an agreement in his own hand writing beginning, "I, A. B. agree, &c.," and leave a place for a signature at the bottom, but never sign it, it may be considered as a note or memorandum in writing within the statute. And yet it is impossible not to see that the insertion of the name at the beginning was not intended to be a signature, and that the paper was meant to be incomplete until it was further signed. This last case is stronger than the one now before us, and affords an answer to the argument that this bill of parcels was not delivered as a note or memorandum of the contract."

But, a note or memorandum not containing the name of the buyer, and signed by the seller only, is not a sufficient signing within the statute. This was determined in the case of *Champion* and another v. *Plummer* (c) which was an action against the defendant for not delivering to the plaintiffs 20 puncheons of treacle bought of him by the plaintiffs, at 37s. *per hundred*, to be delivered on the 10th of *December*. At the trial, it was proved, that a bargain for the treacle in question was made between the plaintiff's clerk and the defendant, as stated in the declaration, and that the following note was made by the plaintiff's clerk in a common memorandum book, and signed by the defendant as under;

(c) 1 New Rep. 252. 5 Esp. Rep. 240.

"Bought of *W. Plummer* 20 puncheons of treacle, 37⁰. to be delivered by 10th *December*. (Signed) *Wm. Plummer*, 31st *October*."

On the part of the defendant it was objected, that this did not amount to a sufficient note or memorandum of the contract within the statute of frauds, as it was not signed by the purchaser; and the plaintiff was nonsuited. And though a rule *nisi* was afterwards obtained, calling on the defendant to show cause why the nonsuit should not be set aside, and a new trial had, yet the Court ultimately decided in favor of the objection. And *Mangfield* Ch. J., before whom the cause was tried, observed, "How can that be said to be a contract, which does not state who are the contracting parties? By this note it does not at all appear to whom the goods were sold. It would prove a sale to any other person as well as to the plaintiffs; there cannot be a contract without two parties, and it is customary, in the course of business, to state the name of the purchaser as well as of the seller, in every bill of parcels. This note does not appear to me to amount to any note or memorandum in writing of a bargain." And of this opinion were the other judges; and accordingly the rule was discharged. So, in *Cooper v. Smith*, (d) it was determined, that a memorandum of sale made by the seller's order in his own book, but without any signature, does not take the case out of the statute. But, in *Allen v. Burnet*, (e) the Court held, that an order for goods written and signed by the agent of the seller, in a book of the buyer, may be connected with a letter of the seller to his agent, mentioning the name of the buyer, and with a letter of the buyer to the seller, claiming performance of the order so as to constitute a complete contract within the statute.

OF THE SIGNING BY AN AGENT THEREUNTO LAWFULLY AUTHORIZED.] The agent here mentioned must be a person unconnected with the contract; and therefore one of the contracting parties cannot be an agent for the other, to satisfy the words of the statute. Thus, in the case of *Wright v. Darmah*, (f) where one of the contracting parties wrote a memorandum of the transactions, and signed it in the presence and with the approbation of the other. It was held, that he could not by so doing be considered as the agent of the other. The authority given to an agent to sign a contract for the sale of goods, within this clause of the statute, need not be in writing; but a parol appointment is sufficient; (g) and such appointment need not be given with a view to a particular transaction, but generally to act as agent in negotiating and transacting business in the way of trade and merchandize. (h) This au-

(d) 15 East Rep. 103.

(e) 3 Taunt. 169.

(f) 2 Campb. 203. Et vide 15 East.
203. 5 Barn. & Ald. 333.

(g) 5 Vin. Abr. 524. fol. ed. 9 Ves.
jun. 251.

(h) Loft's Rep. 352.

thority however, like all others of a similar nature, may be revoked at any time pending the contract, and before it is signed. (i)

A broker who is employed to sell goods, and agrees for the sale of them, and gives to the buyer and seller respectively a copy of the sale notes, he is to be considered as agent for both parties; and his original note is sufficient to satisfy the statute of frauds. Thus, in the case of *Rucker v. Cammeyer*, (k) which was an action of *assumpsit* to recover the price of ten hogsheads of sugar sold by the plaintiff to the defendant; and the facts were, that the plaintiff having a quantity of sugars to sell, samples were sent (as is usual) to the plaintiff's broker, which, together with other samples of different sugars, were exposed to sale, and the defendant examined the samples, and fixed on those for which the action was brought; and he asked the broker from whence the sugars had come, and was answered, "that they came from the north—from *Scotland*." He asked the price, and was told 68s. *per cwt.* The broker said further, that he afterwards brought the plaintiff and defendant together, when he supposed the bargain was concluded, as he soon after received orders from the plaintiff to make out sale-notes of ten hogsheads to the defendant at 68s. *per cwt.* These sale-notes, he said, contained the price and quantity of the sugar sold, and that one of them was usually given to the buyer, and the other to the seller. The plaintiff, he said, had his note from him, and the defendant had sent for his, which was delivered to him; soon afterwards the defendant sent back part of the sugar, saying that he had contracted for new sugars, but that these were old. He said, that at the time of the sale the defendant made no inquiry whether the sugars were new or old. At the trial the counsel for the defendant objected, that this contract was within the statute of frauds; and said, that the broker being the agent of *Rucker* the plaintiff only, and there being no note in writing on the part of the defendant, either by himself or any agent authorised by him, nor proof of any direct and immediate contract of sale with him; that it therefore was void under the statute for want of a note in writing.

Lord *Kenyon* Ch. J. said, "That it was of great importance not to break in on any decision which had taken place on the statute of frauds, and cited the case of *Simon v. Motivos*, as ruling the present case. He said that the broker must be considered as the agent of both parties, and need not be constituted by writing, but that in this case he had in fact given the defendant a note in writing when he gave him the sale-note, which he had accepted."

So, in the case of a sale of goods by public auction, the auctioneer, after knocking down the hammer, is considered as agent for the buyer, and his setting down the name of the buyer, and the price, &c. in writ-

(i) 2 Campb. 339. in notis.

v. *Partridge*, 5 Esp. 256. *Hinde v. Water-*

(k) 1 Esp. Rep. 105. Et vide *Chapman* house, 7 East Rep. 599.

ing, is sufficient to satisfy the 17th clause of this statute. This was settled in the case of *Simon v. Motives*; (l) the defendant bought a lot for more than 10*l.* at an auction; catalogues and conditions of the sale were printed, and the defendant was the best bidder. The auctioneer wrote the defendant's name and the price against the lot in the printed catalogue by the order and assent of the defendant. Between the day of the sale and the time for taking the lot away, the defendant sent his servant to see them weighed; which he did. The defendant neglecting to take away the goods, they were resold at a considerable loss; and this action was brought for the difference: and the Court strongly inclined that sales by auction were not within the statute of frauds, because multitudes are generally present who can testify the terms of the contract. 2dly, They held the contract was here sufficiently reduced into writing, and signed by an agent of the defendant's; for the auctioneer for that purpose was his agent. 3dly, They held the weighing by his servant was a delivery. 4thly, *Yates* Just. held, that as the contract was executory, viz. the lot to be fetched away in six weeks, that therefore it was not within the statute.

So, in the case of *Hinde v. Whitehouse* and *Galan*, (m) which was an action of *assumpsit* to recover the price of sugars sold by auction to the defendants. At the time of the sale the auctioneer's printed catalogue lay on the desk before him, and he wrote down in the same line with the lot purchased, the name of the highest bidder, or purchaser, and the price bid *per cwt.*, thus:

Lot	Mark	Hhds.	Gross Wt.				
23.	R. H.	12	169	3	13	74s.	{ <i>Whitehouse</i> and <i>Galan</i> .
27.		15	207	2	13	74s.	{ <i>Whitehouse</i> and <i>Galan</i> .

An objection was taken at the trial, that there was no legal evidence sufficient to fix the defendants with the purchase of these goods within the statute of frauds; there being no memorandum in writing of the contract signed by the parties or their authorised agent. That the auctioneer was no authorised agent of the vendees; but that supposing he were so, the whole contract must appear upon the paper signed by him with the names of the defendants, whereas the conditions of sale, which formed an essential part of the contract, were not so signed, nor in any ways connected except by parol testimony, which was inoperative by the statute, with the catalogues signed: and that the delivery of the samples was *diverso intuitu*, and not as part of the goods contracted for.

(l) 3 Bur. 1921. 1 Bl. Rep. 599. S. C. of *Simon v. Metivier*. I have therefore
But this case is said to be more accurately taken the report of it from that book.
reported in Bul. N. P. 280., by the name (m) 7 East, 558.

The learned judge (n) over-ruled the objection, but reserved the point for the opinion of the Court of *King's Bench*; and a verdict was found for 1110*l.* And after the case had been fully argued at the bar, and the Court had taken time to consider, Lord *Ellenborough* Ch. J., in delivering the opinion of the Court, said, "Is the writing which has been put upon the catalogue of sale by the auctioneer '*a note or memorandum in writing of the bargain made and signed by the parties to be charged by the contract, or their agents thereunto lawfully authorised,*' within the meaning of the statute? It has been said that sales by auction are not within the statute; and the case of *Simon v. Motivos*, reported in 3 Burr. 1921. and 1 Blac. Rep. 599., has been relied on. The report in Burrow does not distinctly mention this latter point. But in the report of Sir *W. Blackstone*, Lord *Mansfield*, speaking of sales by auction, says, 'The solemnity of that kind of sale precludes all perjury as to the fact itself of sale.' He then mentions the case of a sale of sugars by auction, which were 'afterwards consumed by fire in the auction warehouse, and where the loss fell upon the buyer.' He afterwards adds, 'According to the inclination of my present opinion, auctions in general are not within the statute.' And Mr. Justice *Wilmot* says, that he 'inclined to think that sales by auction, openly transacted before 500 people, are not within the statute.' With all deference to these opinions, I do not at present feel any sufficient reason for dispensing with the express requisition of a memorandum in writing in a statute applying to all sales of goods above the value of 10*l.* without exception, merely because the quantum of parol evidence in the case of an auction is likely to render the danger of perjury less considerable. That argument in a degree applies to all sales in market overt; and if we once get loose from the positive words of the statute, it will become a question only of the quantum and degree of danger of perjury in each particular instance; which opens the door to an indefiniteness of construction founded on all the varying circumstances of the time and frequency of persons attending the places of sale, and the like; which would be destructive of all certainty of practice, and render the rule of the statute perhaps more mischievous than beneficial to the trading world who are to be governed by it. I am not, therefore, prepared to say that sales by auction are not meant to be comprehended within the statute. Nor would I be understood as giving any conclusive opinion to the contrary; neither is it necessary that I should upon the present occasion. The question on the letter of the statute is, Is this a memorandum of the bargain made *by an agent of both parties*? In respect to sales of goods, it has been uniformly so holden ever since the case of *Simon v. Motivos*; and it would be dangerous to break in upon a rule which affects all sales made by

(n) Rooks.

brokers acting between the parties buying and selling, and where the memorandum in the broker's book, and the *bought and sold notes* transcribed therefrom, and delivered to the buyers and sellers respectively, have been holden a sufficient compliance with the statute to render the contract of sale binding on each. All the great transactions of sale in this great city are so conducted, and stand on this foundation of legality only; and it is too late, I conceive, to draw it into question. Supposing the auctioneer or broker for sale to be the agent of both parties, the question then is, Has he made a memorandum of the bargain in this case? and it appears to me that he has not. The minute made on the catalogue of sale, which is *not annexed* to the *conditions of sale*, nor has any *internal reference thereto*, by context or the like, is a mere memorandum of the name of a person, whom perhaps we may *intend to be the purchaser*, and of the quantity and price of the goods, which we may, perhaps, on the foot of such memorandum also *intend* to have been *sold* to the person so named in the catalogue. But in treating it as such memorandum throughout, we must intend also (contrary to the fact) that the goods were sold for ready money, and unattended by the circumstances specified in the conditions of sale. And the conditions of sale, though as unsigned they cannot be evidence of the bargain itself, are yet capable of being given in evidence; and accordingly have been so, as a part of the transaction between the parties, and in order to show that it was on those conditions that the goods were sold. I am of opinion, therefore, that the mere writing on the catalogue, not being by any reference incorporated with the conditions of sale, is not a memorandum of a *bargain* under those conditions of sale."

Some of the judges on the bench, conceiving that the Lord Chief Justice had questioned generally the authority of the case of *Simon v. Motivos*; desired to have it understood, that they concurred in the judgment delivered in this case, on the ground that a part-delivery of the thing bought (which they considered the delivery to and acceptance of the samples by the buyer to be in this case) took the case out of the statute; leaving the authority of that case to stand as it did before on its own ground, untouched and unsanctioned by the present decision. But the Lord Chief Justice declared, "that the only part of that case which he meant to question, though it was unnecessary at present to decide upon it, was the opinion thrown out that auctions were not within the statute, of which he should reserve his approbation for future consideration. But as to the other point there decided, that supposing sales by auctioneers or brokers to be within the 17th section of the statute, the auctioneer or broker must be taken to be the agent of both parties, the practice had become so settled, since the decision of that case, that it would be dangerous to shake it, and it was not his intention to question it."

And it is now settled, (o) that the auctioneer is considered as the agent for both the contracting parties, whether it be of lands or goods; though it was once held by *Eyre* Ch. J., (p) that an auctioneer was not agent for both parties in the case of a sale of *lands* under the 4th section of the statute. If, therefore, the highest bidder at an auction be an agent, and his name be written down by the auctioneer, his principal will be bound. (q) But an auctioneer's clerk cannot, without a special authority, act as agent for his employers so as to satisfy the words of the statute. (r)

3. OF BOUGHT AND SOLD NOTES BY BROKERS.

A great part of the trade and commerce of the city of *London* and other great trading capitals in this country, is carried on through the intervention of brokers, who, when they sell or make purchases for their principals, enter their contracts into a book kept for that purpose, and from which they make out what is termed a bought and sold note, and sign the same respectively; one of which is delivered to the buyer, and the other to the seller; and such broker, as we have before seen, (s) is deemed the agent of both the contracting parties. Upon the subject of these sale-notes, it has been made a question in courts of law, which of the contract notes is to be deemed the original; viz. whether the entry made in the broker's book, or the bought and sold notes delivered to the parties, which indeed ought to be a transcript or copy of the entry. In the case of *Heyman v. Neale*, (t) Lord *Ellenborough* Ch. J. said, "After the broker has entered the contract in his book, I am of opinion that neither party can recede from it. The *bought and sold note* is not sent on approbation, nor does it constitute the contract. The entry made and signed by the broker, who is the agent of both parties, is alone the binding contract. What is called the *bought and sold note* is only a copy of the other, which would be valid and binding, although no *bought or sold note* was ever sent to the vendor or purchaser. The defendant is equally liable in this case, as if he had signed the entry in the broker's book with his own hand."

But in the case of *Cumming v. Roebuck*, (u) the late Chief Justice *Gibbs* held, "that if the broker deliver a different note of the contract to each of the contracting parties, there is no valid contract." And his lordship said, "There is, I believe, a case which states the entry in the broker's book to be the original contract; but it has been since contradicted. Each is bound by the note which the broker delivers; and if different notes are given to the parties, neither can understand the other."

(o) *Emmerson v. Heelis*, 2 Taunt. 38.

(p) *Stansfield v. Johnson*, 1 Esp. 101.

(q) *White v. Proctor*, 4 Taunt. 309.

(r) Vide *Coles v. Trecothick*, 9 Ves. 234.

(s) *Apte*, 99.

(t) 2 Campb. 337.

(u) Holt N.P. Cas. 173.

And in conformity to this opinion, the Court of Common Pleas, in the case of *Thornton v. Kempster*, (v) determined, that a variance between two sale-notes in a material point, as, for instance, in describing in one of the notes delivered the quality of the goods to be "Riga Rhine hemp," and in the other "St. Petersburg clean hemp," the latter being the article really bought, is fatal, and cannot be enforced by action against either party. And *Gibbs* Ch. J. said, "A contract must be perfect in order to be binding; that is, there must be a contract on the one side to accept, and on the other to deliver the same thing. You cannot say that one party is bound to accept what the other party is not bound to deliver. Here the defendant was bound to accept one species of hemp, and the plaintiffs were bound to deliver another species: These cannot together make up one contract. It is an unfortunate case for the plaintiffs, but the objection cannot be got over."

So, if a material alteration in a sale-note is made by the broker after the bargain is concluded, at the instance of either party without the consent of the other, the contract is void as against the non-assenting party, upon the ground of fraud. (w) But a mere mistake in the sale-note of the description of the names of the principals, does not avoid the contract, unless either party can show, that by such mistake he has been really prejudiced, or sustained any inconvenience, or been excluded from making a set-off. (x)

If upon a sale, the broker exhibits a sample, and represents that the bulk is equal in quality, and omits to insert in the sale-note this representation or warranty, no parol evidence can be admitted to incorporate it into the contract, upon the general principle, that parol evidence is inadmissible to contradict a written document. (y)

It may be observed, that the authority of the broker may be countermanded at any time before he has entered and signed the contract of sale. Thus, in the case of *Farmer v. Robinson*, (z) which was an action for not delivering a quantity of brimstone. The defendant had authorised a broker to sell some brimstone for him at a certain price, and the broker had accordingly agreed to sell it to the plaintiff at that price; but before the sale-note was made out, the defendant countermanded the authority of the broker, and said that the plaintiff should not have the goods. Lord *Ellenborough* held, that under these circumstances the contract could not be enforced.

In the Irish provision trade it was proved, in the case of *Dickinson v. Lilwal*, (a) that according to the established practice and usage of the

(v) 1 Marsh. Rep. 355., and 5 Taunt. 786. But see 1 Stark. 140.

(w) *Powell v. Dickett*, 15 East Rep. 99.

(x) *Mitchell v. Lepage*, Holt N.P.C. 253.

(y) *Meyer v. Everth*, 4 Campb. 22.

(z) 2 Campb. 339. in notis.

(a) 1 Stark. 130.

trade, the authority of the broker (as between himself and his principal) to sell expires with the day on which the authority is given, unless it be extended by some special authority to a future day; and that it had been the usual course for the broker to apply for a renewed authority from his principal every morning. In this case, the broker had authority from his principal on the 30th *June*, to sell a quantity of Irish butter; but not having sold it on that day, he, without any further authority, sold the butter on a subsequent day; the principal, however, dissented to the contract, and refused to complete it; and upon the sale-note being presented to him, he took the note and tore it. Lord *Ellenborough* Ch. J. ruled, on proof of the custom, that the contract could not be enforced, and directed the plaintiff to be nonsuited.

4. OF ABSOLUTE AND CONDITIONAL SALES; AND OF PARTICULAR STIPULATIONS ANNEXED TO CONTRACTS OF SALE.

If several distinct parcels of goods are bought under one contract, and without any particular stipulation or condition annexed as to the delivery, it is an absolute and entire contract, so that the buyer is not bound to accept a part only, but may insist on a delivery of the whole. If, however, he accepts one parcel, he cannot legally refuse to accept the rest. Thus, in the case of *Champion v. Short*, (b) where a person gave an order for three different articles, viz. half a chest of French plums, two hogsheads of raw sugar, and 100 lumps of white sugar, to be all sent without delay; the two first articles were sent without delay, and which were accepted; the third was afterwards sent, but the buyer refused to receive it, having previously countermanded the order as to that article. But Lord *Ellenborough* Ch. J. held, that the defendant was liable. And his lordship observed, "Where several articles are ordered at the same time, it does not follow, although there be a separate price fixed for each, that they do not form one gross contract. I may wish to have articles A. B. C. and D. all of different sorts and different values; but without having every one of them as I direct, the rest may be useless to me; I therefore bargain for them jointly. Here, had the defendant given notice that he would accept neither the plums nor the raw sugar, as without the white sugar they did not form a proper assortment of goods for his shop, he might not have been liable in the present action; but he has completely rebutted the presumption of a joint contract, including all the articles ordered, by accepting the plums and tendering payment for them; therefore, if the raw sugar was of the quality agreed on, and was delivered in reasonable time, he is liable to the plaintiff for the price of it."

(b) 1 Campb. 53.

So, in *Barker v. Sutton*, (c) where the plaintiff, having sold 60 coombs of rye to the defendant, to be delivered before *Michaelmas*, and having delivered 50 coombs, brought his action for the amount of that parcel; and it was resolved by *Hale Ch. B.*, "that though the agreement was entire, the several deliveries made several contracts; and that though the payment was to be on the last delivery, yet, a time being set for delivery, it was intended to be paid when the delivery should have been; and that the defendant must resort to his remedy as to the delivery of the residue."

And where an agreement is made for the sale of goods upon this condition, viz. *if he like or dislike them upon view*; if upon his first seeing them, he has agreed or disagreed, approved or disapproved of the goods, the bargain is then complete or void, though he afterwards disagree or agree to the contrary. (d) But if the condition be, *if he like or dislike the goods at such a day*; if he declare his liking or dislike before the day, he may alter it at the day. (e) So, if cattle or goods are sold and delivered upon a contract that the vendee shall use them a certain time on trial, the vendee may retain them the whole time allowed, even though he should have expressed his dislike to them long previous to the expiration of the period allowed for trial. Thus, in the case of *Ellis v. Mortimer*, (f) which was an action to recover the sum of thirty guineas, as the price of a horse sold by the plaintiff to the defendant. At the trial it appeared, that the plaintiff having a horse to sell, offered him to the defendant, and it was agreed that the defendant should give thirty guineas for the horse if he liked him, and should take him a month upon trial; that the defendant having accordingly taken the horse, and kept him for about a fortnight, told the plaintiff, upon being asked how he liked the horse, that he liked the horse but not the price; upon which the plaintiff desired, that if the defendant did not like the price, he would return the horse; that the defendant after this kept the horse ten days, and then sent him back, the month originally agreed upon for trial not being expired; but that the plaintiff refused to receive him. The Court, after argument, determined that the action could not be supported. And *Mansfield Ch. J.* said, "This action is founded on a contract; not upon the unjust detention after the conversation between the parties. The first question then is, what was the contract? It was agreed that the horse should be sold for thirty guineas, but that the defendant should have a month's trial, and should be at liberty to return him at the end of the month if he did not like him. If, indeed, the defendant had made up his mind not to buy the horse, at the time when

(c) *Trials Per Pais*, 369., and *Gilb. Law Evid.* 191. 1 *Campb.* 55. in notis.

(d) *Bro. Contract*, 27. 1 *Rol. Abr.* 449.

1. 22. See also *Com. Dig. tit. Agreements*, A. 4.

(e) 1 *Rol. Abr.* 449. l. 25.

(f) 1 *New Rep. C. B.* 257.

the conversation took place, it was a very unhandsome thing to keep him to the end of the month. But still that was the contract. The effect of the contract seems to me to be, that the defendant shall have to the end of the month to judge whether he likes the horse at the price."

So, where goods are sold on condition that the quality be approved on a particular day; if on that day, the buyer neither renounces the contract or gives notice of approval thereof, the sale becomes absolute on that day, and binding on both parties. Thus, in the case of *Humphries v. Carvalho*, (f) where a broker, on behalf of the plaintiff, agreed to purchase the five casks of ipecacuanha of the defendant for the plaintiff, at the price stated on *Saturday* the 21st of *December*, 1811, subject to the plaintiff's approval of the quality on the *Monday* following; and that the written note of the contract, (commonly called the *bought-note*;) which he sent to the plaintiff on the *Saturday*, had these words on the face of it, "Quality to be approved on *Monday*;" but no *sold-note* was sent on that day to the defendant, because the broker having met him on the same day, and told him that he had sold the ipecacuanha to the plaintiff upon the terms stated, he said there was no occasion to send him a written note: the broker further proved, that it was the custom of the trade for either party to return the contract, if he disapproved of it, within 24 hours. That the plaintiff not having returned the contract, nor signified any disapproval, the broker, on *Friday* the 27th of *December*, sent the *sold-note* to the defendant, with the words, "quality to be approved on *Monday*," struck out; but the defendant returned it again immediately to the broker, upon which the broker went to the defendant on the same day, and insisted on his completing the contract; but he refused to do so on account of its not having been sent to him on the *Monday*. On these facts Lord *Ellenborough* was of opinion that the defendant having agreed on the *Saturday*, to the actual sale of the commodity, at the price stated, subject to the plaintiff's approval of the quality on the *Monday*, and the plaintiff having accepted the contract on those terms, and not having returned it on the *Monday*, which was to be taken as an approval by him of the contract, both parties were bound by it:" And under that direction the Jury found a verdict for the plaintiff.

So, if goods are offered for sale by letter, on condition that an answer is sent by return of post; but owing to some mistake in the direction of the letter, it was not received in due course, though the answer, accepting the offer, was sent on the same day the letter was received; but before it arrived, the goods were sold to another; the vendor was held liable in damages for so selling them. Thus, in the case of *Adams v. Lindsell*, (g) where the defendant by letter offered to sell to the

(f) 16 East Rep. 45.

(g) 1 Barn. & Ald. 681.

plaintiff certain specified goods, on receiving an answer by return of post; but owing to the defendant's misdirecting the letter, there was some delay before it reached the plaintiff; consequently his answer, notifying his acceptance of the defendant's offer, though sent by the first post after the receipt of the letter, reached the defendant two days later than he expected, and he had in the mean time sold the goods to another person. But the Court determined, that the contract was binding upon the defendant, and that he was liable in damages for breach thereof; the delay having arisen from his own mistake. But in the case of *Cooke v. Oxley*, (h) where a proposal was made between A. and B. for the purchase of 266 hogsheads of tobacco at a certain price to which the buyer agreed, but desired time to consider of the proposal till 4 o'clock in the afternoon of the day on which the bargain was proposed, and said he would give notice thereof to the seller before that time; the buyer did give notice before the time allowed, but the seller refused to deliver the tobacco; and the Court determined that he was not bound by the contract, because there was no consideration to bind the bargain.

It frequently happens that particular stipulations are annexed to contracts of sale; as, for instance, where a contract was made for the purchase of 300 tons of Campeachy logwood upon these terms, viz. "to be of real merchantable quality; and such as may be determined to be otherwise by impartial judges to be rejected." The Court held, that the vendee was bound to accept so much of the 300 tons of logwood as were determined to be of real merchantable quality. (i) So, where goods were bought at an auction, and one of the conditions was that they should be cleared away at the buyer's expence in 14 days; but the sale-note given to the buyer expressed 14 days for receiving and delivery: it was held, that the buyer had 14 days to clear and take away the goods; but that the seller was bound to deliver immediately, and was not entitled to 14 days for delivery. (k)

So, in contracts for the sale of foreign goods, it frequently happens that particular stipulations are introduced touching the ship or consignment, and the shipment of the goods. Thus, in the case of *Hayward v. Scougal*, (l) which was an action for breach of the following contract, viz. "Sold for Messrs. Scougal and Co. to Messrs. Hayward and Co. all the sound merchantable *Riga Rhine* hemp that may be loaded by the *Pilgrim*, *Webster*, and one or two other ships, not exceeding 300 tons, now at *Riga*, by the supercargo of the said vessels, or Messrs. *Schmids* and Co., the agents of the concern; the names of the ships to be given up when received, at 81*l.* per ton, &c." The names of two other ships were subsequently mentioned pursuant to the agreement;

(h) 3 Term Rep. 653.

(i) *Graham v. Jackson*, 14 East Rep. 498.(k) *Hagedorn v. Laing*, 6 Taunt. 161.

1 Mar. 514.

(l) 2 Camp. 56.

but when they arrived along with the *Pilgrim*, it appeared that although Messrs. *Schmids* had loaded each of them with a full cargo of hemp, they had shipped by them not more than 71 tons on account of the defendants. This quantity was delivered to the plaintiffs, and the question was, whether the defendants were not bound to deliver 300 tons; so much having been shipped on board of these vessels by Messrs. *Schmids* at *Riga*. It appeared that these gentlemen were agents for various other Russia merchants besides the defendants. Lord *Ellenborough* ruled, that the contract must be confined to such hemp as had been shipped by *Schmid* and Co. as agents of the defendants, who, in effect, had said by the contract, "We will sell you all that our agents at *Riga* ship for us to the amount of 300 tons. If they send us so much, you shall have it; if they send us none, we have sold none to you." The plaintiff was accordingly nonsuited.

But in *Splidt v. Heath*, (m) which was an action for not delivering certain quantities of *Petersburgh* hemp sold by the defendants to the plaintiff, to be shipped on or before the 31st of August old style, by ship or ships, the names of which were to be given up when known. The *Wilberforce* and the *Alfred* were afterwards mentioned as the names of the ships; but they arrived with only a very small portion of the hemp on board. It was stated by way of defence, that the defendants had prepared a full cargo of hemp for these two ships, which would have been much more than sufficient to satisfy the contract; but that while it was coming down in lighters from *Petersburgh* to *Cronstadt*, it was seized by the Russian government, and confiscated as British property; and that the ships which were to have taken it on board were obliged to cut their cables and put to sea, to avoid the embargo. It was argued, therefore, that the defendants were not liable for the effects of the confiscation and embargo, which had prevented the hemp from being shipped by the 31st of August. But Lord *Ellenborough* Ch. J. said, "This case was decided by *Atkinson v. Ritchie*, (n) which was likewise a case of extreme hardship; and as the defendants had absolutely engaged that the hemp should be shipped, they were liable for this not being done, from whatever cause the circumstance had arisen."

5. OF WARRANTIES BY SAMPLE AND OTHERWISE; AND OF DECEIT PRACTISED BY THE SELLER.

1. OF WARRANTIES BY SAMPLE.]—It frequently happens that goods are sold by sample, which is considered as one mode of warranty. And if, upon examination, the bulk of the goods sold, is found not to correspond with the sample, the buyer is not bound to receive them,

(m) 2 Campb. 57. n. s.

(n) 10 East, 530.

even though it may be usual for the purchaser in a particular trade, to take the goods on having an allowance made. The buyer has also a right to inspect the *whole bulk* with the sample at proper and convenient times; and if the seller refuses to shew the whole quantity, the buyer may reject the contract altogether. Thus, in the case of *Lorymer v. Smith*, (a) which was an action for not accepting two parcels of wheat under the following sale-note. "Bought of James Lorymer 700 bushels of wheat, 1400 ditto, ditto, at 9s. 6d. per bushel, according to samples. Banker's bill if required." By the usage of the place, the buyer had a right to inspect the wheat in bulk. And on the 19th of *September* the defendant went to the plaintiff's warehouse and desired to see the wheat; the parcel containing 700 bushels was shewn to him, but the remaining 1400 bushels were not in the plaintiff's warehouse. The plaintiff offered to send a load to the defendant for his inspection, or to send for a bushel at that time, but declined shewing the whole; saying that he did not choose to let defendant into his connexions. The latter replied, that under those circumstances he would not have the wheat. The Court determined that the plaintiff had put an end to the contract by refusing to shew the wheat in bulk when requested. And *Abbott Ch. J.* said, "It appears that, by the usage of the place, the buyer had a right to inspect the wheat in bulk, which is so reasonable, that without any such usage the law would give him that right. Here on the 19th of *September*, the buyer desired to see the whole of the wheat in bulk, but the seller refused to shew it; upon that refusal the request having been made at a proper and convenient time, the buyer was entitled to rescind the contract. If this were not so, a man might bargain to deliver corn not then in his possession, and rely upon making a future purchase in time to fulfil his undertaking; but that is a mode of dealing not to be encouraged." And *Holroyd, Just.* said, "The buyer had a right to inspect the wheat in bulk in order to ascertain whether it corresponded with the sample, and might have insisted upon having it delivered immediately upon tendering a banker's bill for the price. The seller not being ready to complete his part of the contract on the 19th of *September*, when he was requested to shew the wheat, cannot afterwards insist upon performance by the buyer."

So, in *Yates v. Pim*, (b) which was an action upon a warranty; and at the trial it appeared, that on the 29th of *March* 1815, the defendants sold to the plaintiffs 50 bales of bacon, warranted to be (Penrose's) prime singed bacon, at 68s. per cwt., payable by a bill at two months, from the landing, average for weight; the bacon was landed a few days after the contract. On the 31st of *March* one of the plaintiffs examined a bale, and upon the 3d of *April* three more bales were weighed and opened; no objection was taken, and no allowance claimed: a bill was

(a) 1 Barn. & Cres. 1.

(b) 6 Taunt. 445. Holt N. P. 95.

drawn by defendants on plaintiffs for the price of the bacon, which was accepted and duly paid. About the latter end of *May* plaintiffs made a final examination of the bacon, and rejected it on account of taint. The defendants offered evidence to prove, that there was a custom in the trade, upon the sale of bacon, to examine it a few days after the landing if it was not imported at the time of the sale, and at the time of inspection to reject or accept it, or claim an allowance for damage or difference of quality; and that if the buyer did not at that time reject the contract, or claim an allowance, he was bound to accept the bacon without reference to the terms of the contract; but this evidence was objected to on the part of the plaintiff. And *Heath Just.* said, "It would breed endless confusion in the contracts of mankind, if custom were of any avail in a case like the present. I will admit evidence to shew that the buyer inspected the commodity, and made no objection to the quality; but no usage in a trade can deprive a man of the benefit of an express contract; by requiring a warranty, he is to be understood as excepting against all terms but such as are stipulated in the bargain. It is open to the defendants to prove that the plaintiffs acquiesced; and evidence may be admitted to shew that they were guilty of gross negligence in not examining and rejecting the bacon in time; but the evidence of custom cannot be received to alter the contract." The plaintiff accordingly obtained a verdict; and upon a motion afterwards made to set it aside, the Court of Common Pleas confirmed the learned Judge's opinion, and refused the rule.

If, however, upon the examination of goods they do not correspond with the sample, the buyer should immediately give notice thereof to the seller; and if he fail doing so, and keeps the goods, and treats them as his own by putting them up to sale, &c., he cannot afterwards reject the contract. This point was determined in *Parker v. Palmer*, (c) which was an action for not accepting goods mentioned in the following sale-note, "Bought by order and for account of Mr. A. Palmer of Messrs. Parker and Co., ex *Hadlow*, per sample, 1826 bags of East India rice, at 13s. 6d. per cwt., company's conditions, prompt three months, deposit 10% per cent. to be put up at the next East India sale by the proprietors if required." On the 5th of *June* 1820, the rice was put up for sale at the public sale of the East India Company, by the defendant's orders; but no bidding having been made to the extent of the limit put upon it by the defendant, it was bought in for him, in the name of the plaintiff, for the purpose of avoiding the payment of an auction duty. Upon that sale, fresh samples were drawn and exhibited, and these samples were inferior in quality to the sample exhibited to the defendant when he purchased. The prompt expired on the 15th of *August*; and on the 14th

of August, 1820, the defendant declined accepting the rice on the ground that it did not correspond with the purchased sample. The cause was tried before *Abbott Ch. J.*, who held that the defendant was bound to give notice within a reasonable time; and he left it to the Jury upon the evidence to say, whether the defendant had rejected the rice within a reasonable time: They found that he had not, and gave a verdict for the plaintiffs. And on motion to set it aside, the court refused, and determined that the verdict was right. And his lordship on that occasion said, "I stated to the jury that although the declaration did not allege this to be a sale by sample, yet it was a good defence that the goods sold did not correspond with the sample, unless the defendant by his own conduct had precluded himself from taking that objection. The general rule undoubtedly is, in the case of a sale by sample, that the purchaser may reject the commodity if it does not correspond with the sample; but every man may waive a rule of law which is in his own favour. Now I do not say that in every case a purchaser is bound to examine immediately whether the goods correspond with the sample; but I am of opinion that by suffering the rice to be put up for sale after he knew, by the fresh samples drawn from the bulk, that it did not correspond with the original purchase sample, and by fixing a price below which the rice was not to be sold, and thus taking his chance of that sale, the defendant did in fact consent and agree, that, as far as he was concerned, the goods should be considered as corresponding with the sample. And *Holroyd Just.* said, "I am of opinion that the defendant, after what has happened, cannot now say that this contract is wholly void on the ground that the goods do not correspond with the sample. By the terms of the contract, he has a right to require the rice to be put up for sale in the name of the original proprietors. The samples at the public sale were inferior to the original purchase sample. The defendant saw them, and he then had a right to annul the contract altogether. He, however, does not do that, but he treats the goods as if they actually corresponded with the sample. Now a purchaser may perhaps suffer less inconvenience by taking the goods, though inferior in quality to the sample, than by refusing them altogether; and if he takes them under those circumstances, he will be entitled to such damage as he may sustain by their not answering the description in the contract. The defendant treats the goods at the time of the second sale as if they were his own property; for he actually attempts to dispose of them as such. By assuming the dominion over the property, he treats the first sale to him as a valid sale, and he cannot afterwards insist that it is void."

Where the seller produces a sample at the time of the contract of sale, and represents that the bulk is equal in quality; but the sale-note does not mention any thing about sample, if the goods turn out to be

inferior quality, no action will lie upon the parol warranty; it being contrary to the written contract; and the buyer's only remedy is by action of deceit. (d)

So, in *Gardiner v. Gray*, (e) which was an action for not delivering a parcel of silk equal in quality to a sample produced at the time of sale: at the trial it appeared, that the silk in question was imported from the continent; and before it was landed, samples of it which the defendant had received in a letter, were shown to the plaintiff's agent; and the bargain was then made, and the sale-note written out, which merely mentioned that 12 bags of waste silk were sold at 10s. 6d. per pound, without referring to the samples, or specifying particularly the quality of the commodity. The silk was purchased in *London*, and sent down to the defendant at *Manchester*; on its arrival there it was examined, and found to be much inferior to the samples, and of a quality not saleable under the denomination of "waste silk." Upon this evidence, Lord *Ellenborough* Ch. J. said, "The written contract contains no stipulation that the silk should correspond with the sample, and no parol evidence can be received to superadd such a warranty. This, therefore, was not a sale by sample. The sample was not produced as a warranty that the bulk corresponded with it, but to enable the purchaser to form a reasonable judgment of the commodity; I am of opinion, however, that under such circumstances the purchaser has a right to expect a saleable article, answering the description in the contract. Without any particular warranty, this is an implied term in every such contract. Where there is no opportunity to inspect the commodity, the maxim of *caveat emptor* does not apply. He cannot without a warranty insist that it shall be of any particular quality or fineness; but the intention of both parties must be taken to be that it shall be saleable in the market under the denomination mentioned in the contract between them." The plaintiff accordingly obtained a verdict.

But upon a sale by sample with a warranty that the bulk answers the sample, no implied warranty can be raised that the commodity shall be merchantable; and the seller is not answerable though the goods turn out to be unmerchantable: but if the sample answers fairly to the commodity in bulk, the warranty is satisfied. Thus, in the case of *Parkinson v. Lee*, (f) which was an action of *assumpsit*; first, for not delivering hops according to sample; and secondly, that the hops at the time of the delivery thereof to the plaintiff, were not good, sound, and merchantable hops, but on the contrary, were bad, damaged, and unmerchantable. At the trial before *Le Blanc* J. at *Guildhall*, it appeared that the plaintiff and defendant were both dealers in hops, and in *January*, 1800, five pockets were purchased by the plaintiff of the

(d) *Meyer v. Everth*, 4 Camp. 22.

(f) 2 East Rep. 514.

(e) 4 Camb. 144.

defendant, warranted to answer the samples by which they were sold. They were not however removed till the 8th of *July* from the defendant's to the plaintiff's warehouse. The price paid was 16*l.* 5*s.* per hundred, which was the fair market price at the time for good merchantable hops. Previous to, and at the time of the sale, the samples answered fairly to the commodity in bulk; and no defect was perceptible at that time to the buyer: but owing to the grower of the hops having fraudulently watered them after they were dried, before they were originally purchased by the defendant, (a fraud to which the defendant was not privy, and of which he was wholly ignorant at the time of the sale,) it was discovered a few days after the removal of them to the plaintiff's warehouse, that one of the pockets was so much heated as to be in an unsaleable condition; which pocket was thereupon immediately returned to the defendant, who received it back, and allowed for it in settling the account for the other hops, which was done on the 18th of *October* following. In the intermediate time, however, it was found that the other four pockets were in the same unsaleable condition from the same cause; but owing to the plaintiff having first attempted to maintain an action against *Clarke*, the grower, under the mistaken supposition that the defendant was only acting as his agent, (which action was afterwards discontinued on finding that the defendant was not agent but vendee,) the present action was not commenced till upwards of a twelvemonth after the transaction, and after a refusal by the defendant to allow for the rest of the pockets. It appeared further, that the object of watering hops after they are dried is to give them weight; but the effect of it is, after some months, to cause them to heat and corrupt in the pockets or bags into which they are packed, till at last they become quite unfit for sale. This effect is not produced on the sample, which is usually taken from the middle of the bag, by means of its exposure to the air. It is impossible, even for the best judges of the commodities, always to detect this fraudulent practice for some time afterwards, by any inspection of the sample, or of the commodity itself in bulk, till it is disclosed by the gradual process of heating. However, by the latter end of *July*, 1800, the effects of it were apparent in all the pockets; and at the time of the trial, although the samples still continued as at first, the commodity in bulk was become perfectly unmerchantable.

Upon this evidence the learned judge left it to the jury to find for the defendant on the first count, if they were satisfied that the commodity agreed at the time with the sample, by which it was sold, and there was no fraud on his part; notwithstanding any latent defect in the commodity in bulk unknown to the parties, by which it became afterwards deteriorated. But he instructed them, that if they were satisfied that the commodity, at the time of the sale, had such a latent defect as

no prudence or skill of the buyer could, on inspection, detect or guard against, the plaintiff was entitled to recover on the implied warranty in the second count, although the seller had no knowledge of such latent defect; it being the understanding of both parties to such a contract, though not expressed in the special warranty, that the one was to sell, and the other to purchase a merchantable commodity. He also left it to the jury to consider whether the plaintiff, by delaying so long to proceed against the defendant, had thereby waved his remedy against him; which the jury answered in the negative; and found for the defendant on the first count, as the commodity answered, in fact, to the sample at the time of the sale without fraud, and he had then no knowledge of the latent defect of the commodity. The jury gave a verdict for the plaintiff on the second count, considering that there was an implied warranty in the seller that the commodity was in a merchantable state at the time of the sale. But upon a rule for setting aside the verdict and having a new trial, the Court, after argument, determined that there ought to be a new trial, upon the ground that there must either be an express warranty, or fraud in the seller in order to maintain such an action.

Grose Just. said, "This is a case of considerable consequence; because the rule laid down in this case must extend to all other cases of sales, not governed by particular usages of mode in this respect. The question is, whether in the case of a sale made under the present circumstances, there be any implied undertaking in law that the commodity be merchantable? No express undertaking is proved to that effect; and there is no fraud imputed to the defendant. The mode of dealing is, that the plaintiff buys hops from the defendant, whom he knows is not the grower, by samples taken from the pockets in which the commodity is close packed. He has an opportunity of judging by the samples such as he finds them at the time. If he doubt the goodness, or do not choose to incur any risk of a latent defect, he may refuse to purchase without a warranty. If an express warranty be given, the seller will be liable for any latent defect, according to the old law concerning warranty. But if there be no such warranty, and the seller sell the thing such as he believes it to be, without fraud, I do not know that the law will imply that he sold it on any other terms than what passed in fact. It is the fault of the buyer that he did not insist on a warranty; and if we were to say that there was, notwithstanding, an implied warranty arising from the conditions of the sale, we should again be opening the controversy, which existed before the case in *Douglas*. Rep. 20. Before that time it was a current opinion, that a sound price given for a horse was tantamount to a warranty of soundness; but when that came to be sifted, it was found to be so loose and unsatisfactory a

ground of decision, that Lord *Mansfield* rejected it, and said, there must be either an express warranty of soundness, or fraud in the seller, in order to maintain the action. Here neither has been shown; the defendant merely sold what he had before bought upon the same mode of examination. Therefore I think there ought to be a new trial."

Lawrence Just. "I agree that there is no ground for the plaintiff to recover. It is not pretended that the defendant has been guilty of any fraud or imposition in the sale. And I must suppose that each party was equally well acquainted with the commodity bargained for. There was no representation made by the defendant to the plaintiff as to the goodness of the hops, to induce him to make the purchase. But here was a commodity offered to sale, which might or might not have a latent defect; this was well known in the trade; and the plaintiff might, if he pleased, have provided against the risk, by requiring a special warranty. Instead of which a sample was fairly taken from the bulk, and he exercised his own judgment upon it; and knowing as he must have known, as a dealer in the commodity, that it was subject to a latent defect which afterwards appeared, he bought it at his own risk. I know of no authority which makes the seller liable for a latent defect where there is no fraud, and no representation was made by him on the subject to induce the buyer to take the thing. In 1 *Roll. Abr.* 90, it is said, that if a merchant sell cloth to another knowing it to be badly fulled, an action on the case, in nature of deceit, lies against him, because it is warranty in law. But there is no authority stated, to show that the same rule holds if the commodity sold have a latent defect not known to the seller."

2. OF EXPRESS AND IMPLIED WARRANTIES OF GOODS OTHERWISE THAN BY SAMPLE.] — Upon all contracts of sale the law implies a warranty that the goods sold are the property of the seller, and where it proves otherwise, and the buyer is thereby damaged, an action will lie against the seller without an express warranty. (g). So, where a man sells goods to another, and affirms that they are the goods of A. which he has authority to sell, when they are the goods of another, though it is not averred, that he knew them to be the goods of a stranger. (h) This distinction, however, is said to have been taken, that where the seller has the possession of the goods, the bare affirming them to be his is sufficient; but that if he be out of possession, there must be an express warranty in order to support an action. Thus, in the case of *Medina v. Stoughton*, (i) where the declaration stated, that the defendant being possessed of a certain lottery ticket sold it to the plaintiff, affirming it to be his own; whereas in truth it was not his, but an-

(g) 3 Bl. Com. 166. Doug. 18. Cro. Jac. 474. 197. Carth. 90.

(h) 1 *Roll. Abr.* 91. pl. 7. Com. Dig.

tit. Action upon the case for a deceit, A. 8.

(i) 1 *Salk.* 210. 1 *Ld. Raym.* 598. S. C. Cro. Jac. 197. S. P.

other's. The defendant pleaded that he bought it *bona fide*, and so sold it. *Holt* Ch. J. said, "Where one having the possession of any *personal* chattel sells it, the bare affirming it to be his amounts to a warranty, and an action lies on the affirmation; for his having possession is a colour of title, and, perhaps, no other title can be made out; *aliter*, where the seller is out of possession, for there may be room to question the seller's title, and *caveat emptor*, in such case, to have either an express warranty or a good title: so it is in the case of lands, whether the seller be in or out of possession, for the seller cannot have them without a title, and the buyer is at his peril to see it." But Mr. Justice *Buller*, (k) in speaking of this case, makes the following observation; "The case of *Medina v. Stoughton*, in the point of decision, is the same as *Crosse v. Gardner*; (l) but there is an *obiter dictum* of *Holt* Ch. J. that where the seller of a *personal* thing is out of possession, the bare affirming it to be his is not sufficient, for there may be room to question the seller's title, and *caveat emptor*, in such case, to have an express warranty or a good title. This distinction by *Holt* is not mentioned by Lord *Raymond*, 593., who reports the same case; and if an affirmation at the time of sale be a warranty, I cannot feel a distinction between the vendor's being in or out of possession. The thing is bought of him, and in consequence of his assertion: and if there be any difference, it seems to me that the case is strongest against the vendor when he is out of possession, because then the vendee has nothing but the warranty to rely on."

The warranty must be *upon the sale*; for if it be made *after*, and not *at* the time of the sale, it is a void warranty; for it is then made without any consideration; neither does the buyer then take the goods upon the credit of the vendor. Also the warranty can only reach to things in being at the time of the warranty made, and not to things *in futuro*; as, that a horse is sound at the buying of him; not that he will be sound two years hence. (m) But if the vendor knew the goods to be unsound, and hath used any art to disguise them, or if they are in any shape different from what he represents them to be to the buyer, the vendor is answerable for the misrepresentation. (n) So upon every contract of sale to furnish manufactured goods, whether by sample or otherwise, however low the price may be, where there is no opportunity of inspection, the law implies that they shall be merchantable. Thus, in the case of *Laing v. Fidgeon*, (o) which was an action upon a

(k) Vide *Pasley v. Freeman*, 3 T.R. 57. said, "There is no doubt but you may warrant a future event."
(l) Carth. 90.

(m) Finch's Law, 189. Dy. 76. a. F. (n) Vide cases last cited.
N.B. 98. K. 2 Cro. 630. 2 Rol. Rep. 5. (o) 6 Taunt. 108. 4 Campb. 169. See
5 Bl. Com. 166. But see Doug. Rep. 755. also *Gardiner v. Gray*, 4 Campb. 144.
where Lord Mansfield is reported to have S.P.

breach of an implied warranty; and at the trial the evidence was, that the defendant, having previously sent to the plaintiff a sample of the saddles that could be furnished at the price aftermentioned; the plaintiff gave him an order for "goods for North America, three dozen single flap saddles, 24s. à 26s. with cruppers," &c. It was proved, that the saddles delivered were of very inferior materials and workmanship, and useless and unmerchantable; and they did not correspond with the sample. After verdict for the plaintiff, it was objected that there was no proof of any contract that the goods should be merchantable; and the price fixed being so low, that a good saddle could not be made for that money, the plaintiff was thereby sufficiently apprised what species of goods he was to expect; there was no warranty in fact, and the law did not under these circumstances imply a warranty that the goods were merchantable. But the Court held, "that although there was no express contract that the article should be merchantable, it resulted from the whole transaction that the article was to be merchantable. The defendant might have rejected the order; but having accepted it, he ought to furnish a merchantable article."

So, in the drug trade, where it is customary upon the sale of pimento, for the auctioneer or seller to declare at the time of sale, whether the article is sea-damaged or not; and that when no mention is made of the state of the pimento, it is known and understood in the trade not to be sea-damaged; this silence raises an implied warranty that it is not sea-damaged. (p) So, if a publican agrees with his brewer to take all his beer of him; the brewer is bound, without any express warranty, to supply the publican with beer of a fair and wholesome quality. (q)

So, where goods are described in an invoice, or bill of parcels, to be of a particular description and quality, and charged as such, this amounts to a warranty; and the seller is bound to deliver goods of that description and quality; and if he does not, he is liable to an action for breach of such warranty. (r) So, where a warranty of seed is given in these terms, "good round white turnip-seed, which the seller could warrant;" if the seed fails in the growth on account of the badness of the quality, the seller is answerable to the buyer upon such a warranty, for the damage he may have sustained in consequence of the failure of the crop. (s)

But in a sale of pictures, the putting down the name of an artist in a catalogue as the painter of any picture, is not such a warranty as will subject the party selling to an action, if it turns out that he might be mistaken, and that it was not the work of the artist to whom it was

(p) *Jones v. Bowden*, 4 Taunt. 847.

(q) *Holcombe v. Hewson*, 2 Campb.

391. See also *Cooper v. Twibill*, 3 Campb. 286. n. a.

(r) *Bridge v. Wain*, 1 Stark. 504.

(s) *Button v. Corder*, 7 Taunt. 405.

attributed. Thus, in the case of *Jeudwine v. Slade*, (*t*) which was an action brought to recover damages on the sale of two pictures, one of which was said to be a *Sea-piece* by *Claud Loraine*, the other a *Fair* by *Tencirs*, which the defendant had sold to the plaintiff as originals, when in fact they were copies. The defence relied on was, that they were sold under a catalogue, not amounting to an absolute warranty, but upon which the buyer was to exercise his own judgment; and further, that a bill had been filed by the defendant two years ago to compel the plaintiff to complete the sale; to which he had put in no answer, but paid the money, and that he therefore could not now seek to rescind the contract after such acquiescence. The plaintiff's counsel answered this objection, by insisting that the name of the artist put opposite any picture in a catalogue was a warranty; and if the article sold did not correspond with it it avoided the sale; and as to the transaction, in respect of paying the money, that the plaintiff was deceived, but had brought his action as soon as he discovered the fraud. Several of the most eminent artists and picture dealers were called, who differed in their opinion respecting the originality of the pictures. When the evidence was closed, Lord *Kenyon* Ch. J. said: "It was impossible to make this the case of a warranty; the pictures were the work of artists some centuries back, and there being no way of tracing the picture itself, it could only be matter of opinion, whether the picture in question was the work of the artist whose name it bore, or not; and the catalogue of the pictures in question leaves the determination to the judgment of the buyer, who is to exercise that judgment in the purchase; for if the seller only represents what he himself believes, he can be guilty of no fraud." The plaintiff was accordingly nonsuited.

Where a treaty for the sale of a commodity had been entirely broken off, a warranty made at the time of such treaty, was holden not to extend to a subsequent sale of the same commodity at a reduced price. Thus, in an *anonymous* case, (*u*) which is reported as follows: "The defendant came to the plaintiff, who was a sword-cutler, to sell him a second-hand sword; and upon his warranting it to be a silver hilt, the plaintiff offered him a guinea and a half for it; the defendant refused to take the money, and thereupon went to several other sword-cutlers, but not meeting with any who would give so much as the plaintiff, he came back to him, and told him he should have it for the price he offered; the plaintiff upon that, thinking to have it cheaper, refused to give the guinea and a half, and at last beat down the price to 28s., which was paid the defendant for the sword. Afterwards the plaintiff found that the gripe of it was only silver, and the rest of the hilt was

(*t*) 2 Esp. Rep. 572.(*u*) Stra. 414.

brass; upon which he brings his action against the defendant, and declares upon the warranty of the hilt's being *silver*, when in fact it was *brass*; but not being able to prove a warranty upon the second bargain, he was nonsuited. *Pratt* Ch. J., being of opinion, that the warranty upon the bidding a guinea and a half would not extend to this sale, which was a new and different contract at a different time. Also he seemed to be of opinion, that the gripe being silver, the plaintiff should have declared specially on a warranty of the rest of the hilt only, and have said that that part was brass."

If a person having goods which are damaged, and, knowing them to be in that state, sell them for sound and marketable goods, and affirm them to be so, an action on the case lies for the deceit: but if the seller, at the time of the sale, does not know that they are damaged, no action lies without an *express warranty*; though, at the time of the sale, he affirms them to be sound. Thus, in the case of *Chandelor v. Lopus*, (v) which was an action upon the case wherein the plaintiff declared; whereas the defendant being a goldsmith, and having skill in jewels and precious stones, had a stone which he affirmed to the plaintiff to be a bezar-stone, and sold it to him for 100*l.*, whereas it was not a bezar-stone. The defendant pleaded not guilty, and a verdict was given, and judgment entered for the plaintiff in the *King's Bench*. But error was thereof brought in the exchequer chamber; because the declaration did not contain matter sufficient to charge the defendant, viz. that he warranted it to be a bezar-stone, or that he knew that it was not a bezar-stone; for it may be that he himself was ignorant whether it was a bezar-stone or not. And all the justices and barons (except *Anderson*) held, "that for this cause it was error, for the bare affirmation that it was a bezar-stone, without warranting it to be so, is no cause of action: and although he knew it to be no bezar-stone, it is not material; for every one in selling his wares will affirm that his wares are good, or the horse which he sells is sound; yet if he does not warrant them to be so, it is no cause of action, and the warranty ought to be made at the time of the sale; as F. N. B. 94. C. and 98 B. 5 Hen. 7. pl. 41. 9 Hen. 6. pl. 53. 12 Hen. 4. pl. 1. 42 Ass. 8. 7 Hen. 4. pl. 15. Wherefore forasmuch as no warranty is alleged, they held the declaration to be ill." But *Anderson* to the contrary; "for the deceit in selling it for a bezar, whereas it was not so, is cause of action." But, notwithstanding, it was adjudged to be no cause, and the judgment was reversed.

So, where a ship, or any other commodity is sold "*with all faults*," and so declared at the time of sale, the vendor is not answerable for any latent defect or secret fault known to him at the time, unless he

(v) Cro. Jac. 4. et vide 1 Dy. 75. a. F. N. B. 94. C. 3 Bl. Com. 166. 3 Wood-deson's Lect. 199.

practise some artifice to prevent a discovery of it by the purchaser. (w) A contrary doctrine, however, was once held; (x) but that decision was afterwards much considered, and overruled. (y)

So, upon a return and exchange of wine between a wine-merchant and his customer, where no representation is made at the time by the customer of the quality of the wine he returns, and no fraud is practised, he is not answerable for the condition of the wine at the time of its return to the wine merchant. Thus, in the case of *La Neuville v. Nourse* (z) the facts proved were as follow; the defendants who had purchased ten dozen of *Burgundy* wine of the plaintiffs about a year before, applied to the plaintiffs to have it exchanged for *Champaigne*, which was at that time of the same price. The plaintiffs agreed to this, and the exchange took place. When the *Burgundy* was sent to the defendants it was of the first quality and in the best condition; but when it was returned it was quite sour, and only fit to be used as vinegar. An action was brought to recover the value of the *Champaigne*, or a compensation for the bad condition of the *Burgundy*. There was no evidence of any representation by the defendants respecting the condition of the wine, or of any promise by them upon the subject. Lord *Ellenborough* Ch. J. held, that without evidence of an express warranty, or of direct fraud, the action could not be supported; and that the maxim of *caveat emptor* applied to this case.

But it is clear, that any intentional deception practised by the seller, for the purpose of disguising the latent defects of a ship or any other article sold, and in order to elude the vigilance of the buyer, is fraudulent, and avoids the contract. Thus, in the case of *Schneider v. Heath*, (a) which was an action for money had and received, to recover back the deposit paid upon the purchase of a ship called the *Juno*, on the ground of misrepresentation and fraud on the part of the vendor. The particular exhibited at the sale described the hull of the ship to be nearly as good as when launched, requiring a most trifling outfit; but further, "that the vessel and her stores are to be taken with all faults, as they now lie, without any allowance for weight, length, quality, or any defect whatever." The vessel was purchased by the plaintiff for 1580*l.*, and he immediately paid the deposit of 397*l.* 2*s.* which he now sought to recover. Having taken possession of her, he sent her to a shipwright's to be examined; here it was found that her bottom was worm-eaten, that her keel was broken, that she was quite unseaworthy, and that she by no means corresponded with the description in the particular. The

(w) *Baglehole v. Walters*, 5 Campb. 154 and see 4 Taunt. 779.

(x) *Mellish v. Motteux*, Peake's N. P. Rep. 115.

(y) Vide the cases cited in note w.

(z) 5 Campb. 551.

(a) *Ibid.* 566. et vid. *Fletcher v. Bowsher*, 2 Stark. 561.

plaintiff therefore refused to complete the purchase, and demanded back his deposit. At the trial it appeared in evidence, that the ship belonged to a club of underwriters, to whom she had been abandoned, and on whose account she was sold; that the state of her bottom and her keel must have been known to the agents employed to conduct the sale; and that the captain, when the ship was advertised for sale, took her from the ways on which she lay, and where the state of her bottom and her keel might easily have been discovered, and kept her constantly afloat, so that these defects were completely concealed by the water. The person who had framed the particular stated, that he had inserted the description without having examined her. *Mansfield* Ch. J. said, "The words are very large to exclude the buyer from calling upon the seller for any defect in the thing sold; but if the seller was guilty of any positive fraud in the sale, these words will not protect him; there might be such fraud, either in a false representation, or in using means to conceal some defect. I think the particular is evidence here by way of representation, which states the hull to be nearly as good as when launched, and that the vessel required a most trifling outfit. Now, is this true or false? If false, it is a fraud which vitiates the contract. What was the fact? the hull was worm-eaten, the keel was broken, and the ship could not be rendered sea-worthy without a most expensive outfit. The agent tells us, he framed this particular without knowing any thing of the matter; but it signifies nothing, whether a man represents a thing to be different from what he knows it to be, or whether he makes a representation which he does not know at the time to be true or false, if in point of fact it turns out to be false. But besides this, it appears here that means were taken fraudulently to conceal the defects in the ship's bottom. These must have been known to the captain, who is to be considered as the agent of the owners; and he evidently, to prevent their being discovered by persons disposed to bid for her, removed her from the ways, where she lay dry, and kept afloat in the dock till the sale was over. Therefore, consistently with the decided cases upon this subject, I am of opinion that the plaintiff is entitled to recover back his deposit." And a verdict was accordingly found for the plaintiff to that extent.

So, where, in an advertisement for the sale of a ship, she was described as "a copper-fastened vessel," but with these words subjoined, "the vessel to be taken with all faults, without allowance for any defects whatsoever;" the vessel when sold was only partially copper-fastened, and that she was not what is called in the trade, a copper-fastened vessel. The buyer, however, had a full opportunity of examining the vessel before the sale. But it was determined that the buyer was entitled to damages in an action upon the warranty; and that the words "with all faults" could only mean all faults which a copper-fastened

ship may have ; but here the vessel was not what she was warranted to be, namely, "a copper-fastened vessel." (a) In all cases of sales, where the goods upon examination do not correspond with the sample and warranty, the buyer should immediately give notice thereof to the seller, and offer to return them ; for by neglecting to do so within a reasonable time after the sale and inspection, every inference would be taken most strongly against the presumption of their having been defective at the time of delivery. Thus, in the case of *Prosser v. Hooper*, (b) which was an action against the seller upon a breach of warranty upon a sale of 100lbs. weight of saffron ; at the trial it was proved on the part of the plaintiff, that the article delivered was not saffron, but that a fourth part consisted of a vegetable resembling it, which it was impossible to detect at the time of sale. But on the part of the defendant it was proved, that the plaintiff knew that the saffron was of an inferior quality, and that they paid for it accordingly, at the rate of 48s. per pound, when the best was worth 73s. ; it was also proved, that the plaintiffs examined the bulk, and refused to buy by sample ; that they kept it six months without objecting to the article, and that they had sold part of it, when they insisted that it was not saffron ; and brought their action accordingly. It was urged by the plaintiff's counsel, that the keeping of the article for six months could not do away the contract, which was for the purchase of saffron, and that the maxim of *caveat emptor*, could not be set up as a defence for the nonperformance of a written contract. The jury, however, found a verdict for the defendant. And upon a motion for a rule to set aside this verdict, the Court, after argument, refused the rule ; and Lord Ch. J. *Gibbs* said, " This article was sold to the plaintiffs by the name of saffron ; they examined it with great minuteness ; received it into their custody ; kept it six months, and then sold a part of it. Although only three-fourths of it were saffron, still it was fair for the jury to infer, from the inferior price that was given for it, that it was such an article that the plaintiffs intended to purchase : and under all the circumstances, they were justified in giving their verdict for the defendant."

3. OF THE WARRANTY OF SOUNDNESS, &c. OF CATTLE.] — Upon the sale of cattle, a warranty of soundness is frequently given by the seller to the buyer. This kind of warranty, however, gives rise to great disputes and litigation ; and it is much to be feared, that deceit and false swearing are too often resorted to on these occasions in order to get rid of the liability upon warranty. It is, indeed, sometimes difficult to ascertain what amounts to unsoundness in a horse. I shall therefore lay before the reader the substance of the different cases which have been determined on the question of warranty and deceit, and shew the general rules of law

(a) *Shepherd v. Kain*, 5 Barn. & Ald. 240.

(b) 1 Mo. Rep. 106. et vid. 1 Stark. 140. Ante 111. 129.

relating to the sale of cattle. In our earlier books on this subject, we find it laid down, that if there be a communication between A. and B. for the buying of sheep, and thereupon B., the vendor, says they are his own sheep, when in truth they are the sheep of another, and A. buys them of B., an action lies against B. though he made not any express warranty of the sheep. (c) So, if A. sells sheep, and warrants that they are sound, and shall continue so for a year after, this is good, and shall bind him. (d)

The words of a warranty shall have a reasonable construction; as (e), if a man take sheep to depasture, and warrant that he will keep them sound in his land, that shall be intended that his pasture shall not infect them; but an action does not lie if they were unsound at the time of the warranty. But where a person sells a horse, affirming it to have been his from a colt, when it was not, an action lies for this deceit. (f) So, if a man sell unto another a horse, and warrant it to be sound and good, &c.; if the horse be lame or diseased that he cannot work, the buyer shall have an action upon the case against the seller. (g) But it is said, that unless the seller expressly warrant the horse to be sound, no action will lie; for if he sell it without such warranty, it is at the buyer's peril, and his eyes ought to be his judges in that case. (h)

So, a general warranty will not extend to guard against defects that are plainly and obviously the object of one's senses; as, if a horse be warranted perfect, and wants either a tail or an ear, unless the buyer in this case be blind. But if cloth is warranted to be of such a length, when it is not, there an action on the case lies for damages; for that cannot be discerned by sight, but only by a collateral proof, the measuring of it. (i) Also, if a horse is warranted sound, and he wants the sight of an eye, though this seems to be the object of one's senses, yet, as the discernment of such defects is frequently a matter of skill, it hath been held that an action on the case lieth to recover damages for this imposition. (k) Thus, in the case of *Butterfield v. Burroughs*, (l) the plaintiff declared that the defendant sold him a horse such a day, and at such a place, and then and there warranted the said horse to be sound, wind and limb; whereupon he paid his money, and avers the horse had but one eye, &c. The defendant pleaded *non warrantizavit*, upon which there was a verdict for the plaintiff: but in arrest of judgment, it was objected, first, that the want of an eye was a visible thing; whereas the warranty extends only to secret infirmities. To this, however, it was answered, and resolved by the Court, that this might be so,

(c) 1 Rol. Abr. 90. pl. 6. Cro. Jac. 474.

(d) 1 Dan. Abr. 188.

(e) 1 Rol. Abr. 97. pl. 4.

(f) 1 Rol. Abr. 91. l. 10.

(g) F. N. B. 94. C. 1 Rol. Abr. 96. Doug. 18.

(h) F. N. B. 94. C. Bridg. 127.

(i) Finch L. 189. 3 Bl. Com. 165.

(k) Ibid.

(l) 1 Salk. 311. et vid. 2 Rol. Rep. 5. Bridg. 128. Cro. Jac. 387. 3 Bulst. 95. 3 Keb. 101. F. N. B. 94. C. n. c.

and must be intended to be so, since the jury had found the defendant did warrant. The second objection was, that the warranty, as is here set forth, might be at a time after the sale; whereas it ought to be part of the very contract; and therefore it is always alleged *warrantizando vendidit*. *Sed non allocatur*; for the payment was afterwards, and it was that which completed the bargain, which would have been imperfect without it.

So, if A. sells a horse to B. and warrants him to be sound wind and limb, and clean of legs, whereas he well knows that he is shoulder pitched, and has splints upon his legs, an action lies against him upon this warranty; for these imperfections are not subject to the view of an unskilful person. (m) But a warranty that a horse is sound, is not falsified by its labouring under a temporary injury happening from an accident. Thus, in the case of *Garment v. Barrs*, (n) which was an action of *assumpsit* on a warranty of a mare sold by the defendant to the plaintiff. The declaration stated, that in consideration that the plaintiff, at the special instance and request of the defendant, had bought of him a certain mare of great value, the defendant undertook and promised the plaintiff that she was sound, &c. At the trial, the first witness called on the part of the plaintiff proved the sale, and that the defendant warranted her to be sound; but he said further, that, upon the plaintiff observing that she went rather lame of one leg, the defendant said that that had been occasioned by her taking up a nail at the farrier's, and except as to that lameness, she was perfectly sound. The counsel for the defendant contended that the plaintiff should be nonsuited on the ground of a variance. He observed, that the plaintiff had declared upon a warranty in general terms that the mare was sound; whereas the warranty proved in evidence was, with an exception of the lameness of the foot; this he contended was a fatal variance. But *Eyre Ch. J.* said, "A horse labouring under a temporary injury or hurt, which is capable of being speedily cured or removed, is not for that an unsound horse; and where a warranty is made that such a horse is sound, it is made without any view to such injury; nor is a horse so circumstanced an unsound horse within the meaning of the warranty. I am of opinion, that to make the exception such as ought to have been stated in the declaration, as a qualification of the general warranty, so as to make a fatal variance between the warranty really made, and that stated in the declaration, the injury the horse had sustained, or the malady under which he laboured, ought to be of a permanent nature, and not such as arose from a temporary injury or accident."

A contrary opinion, however, was once held by Lord *Ellenborough*, in the case of *Elton v. Brogden*, (o) which was an action upon a warranty of a

(m) 1 Rol. Abr. 97. pl. 14.

(o) 4 Camp. 281.

(n) 2 Esp. Rep. 673.

horse; it was proved that it was lame at the time of the sale, which the defendant admitted, but undertook to prove that the lameness was of a temporary nature, that he afterwards recovered, and had become in all respects sound. But Lord *Ellenborough* Ch. J. said, "I have always held and now hold, that a warranty of soundness is broken, if the animal at the time of the sale had any infirmity upon him which rendered him less fit for present service. It is not necessary that the disorder should be permanent or incurable. While a horse has a cough, I say he is unsound, although that may either be temporary or may prove mortal. The horse in question having been lame at the time of the sale, when he was warranted to be sound, his condition subsequently is no defence to the action." And a verdict was accordingly found for the plaintiff.

Upon a warranty of the soundness of a horse, it is now settled, that a horse afflicted with roaring is an unsoundness. (p) But *crib-biting* is said not to be an unsoundness; and amongst those who are skilled in the veterinary art, it is said, that there is a division in opinion, whether or not thrushes, splints, and quidding, can be deemed unsoundness. (*)

If the seller of a horse refers to a written pedigree to ascertain his age, but declares he knows nothing more about it, he is not liable if the pedigree turns out to be false. Thus, in the case of *Dunlop v. Waugh*, (q) which was an action of *assumpsit* on a promise that a horse, bought by the plaintiff of the defendant, was only eight years old, when in fact, he was fourteen. The defendant, when he sold the horse, showed the plaintiff a written pedigree, which he had received with him from the person of whom he had bought him, and said that he sold the horse according to that pedigree, knowing nothing of him further than he had learnt therefrom, the mark being out of his mouth when he had bought him. The pedigree was clearly proved to be false, but the defendant had no knowledge of this when he sold the horse. Lord *Kenyon* Ch. J. was clearly of opinion "that this was no warranty. The defendant related all he knew of the horse, and did not enter into any express undertaking that the horse was of the age stated in the pedigree, but stated the contents of that which the plaintiff relied on."

If a horse is sold warranted sound; and it can be clearly proved, that it was unsound at the time of sale, the seller is liable to an action on the warranty without either the horse being returned, or notice given of the unsoundness. Thus, in the case of *Fielder v. Starkin*, (r) which was an action of *assumpsit* on the warranty of a mare, "that she was sound, quiet, and free from vice and blemish." On the trial it appeared, that the plaintiff had bought the mare in question of the defendant, at

(p) *Onslow v. Eames*, 2 Stark. 81.

(r) 1 H. Bl. 17. et vid. post. Chap. 4.

(*) Holt Ni. Pri. Cas. 630. 2 Campb. tit. Money had and received.

524. in notis.

(q) *Peake's Cas. Ni. Pri.* 123.

Winnel fair, in the month of *March*, 1787, for thirty guineas; and that the defendant warranted her sound, and free from vice and blemish. Soon after the sale, the plaintiff discovered that she was unsound and vicious, but kept her three months after this discovery, during which time he gave her physic, and used other means to cure her. At the end of the three months he sold her; but she was soon returned to him as unsound. After she was so returned, plaintiff kept her till the month of *October*, 1787, and then sent her back to the defendant as unsound, who refused to receive her. On her way back to the plaintiff's stable the mare died; and, on her being opened, it was the opinion of the farriers that she had been unsound a full twelvemonth before her death. It also appeared that the plaintiff and defendant had been often in company together during the interval between the month of *March*, when the mare was sold to the plaintiff, and *October*, when he sent her back to the defendant; but it did not appear that the plaintiff had ever in that time acquainted the defendant with the circumstance of her being unsound. The jury found a verdict for the plaintiff, with thirty guineas damages: but the defendant afterwards obtained a rule *nisi* for the plaintiff to show cause why the verdict should not be set aside, and a nonsuit entered, upon the ground that the horse had not been returned, nor any notice given to the defendant of the unsoundness. The Court, however, after argument, discharged the rule, and determined that it was not necessary either to return the horse, or give notice of its unsoundness.

But if a warranty be accompanied with an undertaking on the part of the seller to take the horse again, and pay back the purchase money; if on trial he shall be found to have any of the defects mentioned in the warranty, the buyer must return the horse as soon as he discovers any of those defects, in order to maintain an action on the warranty, unless he has been induced to prolong the trial by any subsequent misrepresentation of the seller; and in such case the term *trial* means a reasonable trial. (s)

So, where a horse is sold by public auction, and one of the conditions of sale is, that the purchaser of any horse warranted sound, who shall conceive the same to be unsound, shall return him within two days, otherwise he shall be deemed sound: if the buyer neglects to return the horse within the time allowed, no action will lie on the warranty. (t) But, if a horse sold at a public auction be warranted sound, and six years old, and it be one of the conditions of sale that he shall be deemed sound, unless returned within two days, this condition applies to the warranty of soundness only, and not to the age of the horse. Thus, in the case of *Buchanan v. Parnshaw*, (u) where a horse was sold

(s) *Adam v. Richards*, 2 H. Bl. 573.

(u) 2 Term Rep. 745.

(t) *Mesnard v. Aldridge*, 3 Esp. Rep.

with such a warranty, and it was discovered ten days after the sale to be twelve years old ; and was then offered to the seller, who refused to take him. It was holden that an action might be maintained by the buyer against the seller upon the warranty ; and that his right to recover was not affected by his having sold the horse after offering him to the defendant. Lord *Kenyon* Ch. J. said, “ The condition of sale must be confined solely to the circumstance of *unsoundness*. There is good sense in making such a condition at public sales ; because, notwithstanding all the care that can be taken, many accidents may happen to the horse between the time of sale and the time when the horse may be returned, if no time were limited : but the circumstance of the age of the horse is not open to the same difficulty.”

In order to entitle the buyer to recover the keep of an unsound horse, he must make an offer to return it to the seller. (v) And when cattle or goods are sold and delivered upon a warranty of soundness, or other particular quality, if the buyer discovers the warranty to be untrue, he should immediately return the thing bought to the seller ; otherwise he will be liable to an action for the price agreed on ; and he cannot defend himself upon the ground of the warranty being untrue : for where the buyer keeps the thing bought, his only remedy in such case is by action for damages upon the warranty. Thus, in the case of *Curtis v. Hannay*, bart, (w) which was an action of *assumpsit* to recover the price of a horse sold by the plaintiff to the defendant, who was an officer in the life-guards ; and upon its being proved, that the horse had been warranted, the defence set up was, that the warranty had not been complied with, the horse having defective eyes when sold : but it appeared in evidence that the defendant had been informed of the defect in the eyes the day after he bought the horse, but that he kept it near seven weeks afterwards before he returned it ; and, in the course of which time, suspecting the horse had some defect in his feet, he had applied a blister and some other medicines to the part : this produced a disorder called a thrush, and a considerable degree of lameness ; it was, however, only a temporary lameness, and the horse recovered of it ; and it was in evidence, that the remedies applied to the leg and foot could not have affected the eyes. Upon these facts being proved, Lord *Eldon* Ch. J. said, “ He thought the matter set up by the defendant was no defence to the action : it appeared that the horse had defective eyes when sold, and that that defect was made known to the buyer a very short time after he had purchased him. Instead of returning him immediately, the defendant doctored him : this produced a new disorder, which the horse had not when sold. The question was, would the horse, when returned to the seller, be diminished in

(v) *Caswell v. Coare*, 2 Campb. 82.

(w) 3 Esp. Rep. 82.

value by this doctoring? If he would, his lordship said he thought the defendant should pay the price, and bring his action against the seller for any defect in the warranty existing at the time of the sale. He took it to be clear law, that if a person purchases a horse which is warranted, and it afterwards turn out that the horse was unsound at the time of the warranty, the buyer might, if he pleased, keep the horse, and bring an action on the warranty, in which he would have a right to recover the difference between the value of a sound horse, and one with such defects as existed at the time of the warranty; or he might return the horse, and bring an action to recover the full money paid; but in the latter case, the seller had a right to expect that the horse should be returned in the same state he was when sold, and not by any means diminished in value: for his lordship said, "if a person keeps a warranted article for any length of time after discovering its defects, and when he returns it, it is in a worse state than it would have been if returned immediately after such discovery, I think the party can have no defence to an action for the price of the article on the ground of noncompliance with the warranty; but must be left to his action on the warranty, to recover the difference in the value of the article warranted, and its actual value when sold." And his lordship concluded with saying, "that if the jury thought, that if any future purchaser was to be told that the horse had been blistered and doctored, it would diminish its value in the estimation of such purchaser, they should find a verdict for the plaintiff;" which they accordingly did, for forty-five guineas, the price agreed upon.

Where A. and B. severally employ C. to sell their horses, C. sells both to D. at an entire price, and warrants them sound, D. cannot sever the contract and bring an action on the warranty against A., in respect of the unsoundness of A.'s horse; his remedy being against C. alone. (x)

6. OF SALE OR RETURN OF GOODS.

In particular trades it is very common for the manufacturer or wholesale trader to send to a retail dealer different articles of manufacture upon the terms of *Sale or Return*. When this happens, the retail dealer should notify to the trader within a reasonable time, whether he intends buying them or not, and to act accordingly; for if the goods are kept an unreasonable length of time, without any notification, the retail dealer may be thereby fixed with the price of them. Thus, in the case of *Barley v. Gouldsmith*, (y) which was an action for goods sold and delivered. The goods were delivered on the terms of sale or return, in

(x) *Symonds v. Carr*, 1 Campb. 361. (y) *Peake's Cas. Ni. Pri.* 56.
Et vid. Hort v. Dixon, Selw. Ni. Pri. 101.

the beginning of the year 1789, and consisted of waistcoats made in *England*, exported to *France*, there embroidered and imported again into *England*. But the defendant had never returned or offered to return them. Lord *Kenyon* Ch. J. said, "that no certain time being mentioned for the return of the goods, the jury should consider whether a reasonable time had elapsed for the return according to the usual course of dealing in that trade. His lordship was inclined to think there had; and if the jury should be of that opinion, he should consider them as goods sold and delivered." But the jury gave no verdict, as the plaintiff consented to a nonsuit upon another ground, wholly irrelevant from the present subject.

When goods are sent upon sale or return, and the retail dealer becomes bankrupt whilst they remain in his possession, such goods pass to his assignees under the commission, even though no notification was made by the bankrupt prior to his bankruptcy, whether he would keep or return them. (x)

7. OF SALE AND EXCHANGE.

Contracts of sale and exchange differ from ordinary sales in this respect, namely, that in the one case money is given as the price of the goods sold, and in the other, one commodity is bartered in exchange for another. Both are founded on a valuable consideration, and are governed by the same rules of law. But in contracts of sale and exchange, the law will not raise any implied warranty. (a) And if upon a sale and exchange of goods, the goods are delivered to the parties respectively, the property in the goods so delivered remains with the possessor. Thus, in the case of *Emanuel v. Dane*, (b) which was an action of trover for a watch; and the plaintiff's case was, that he had exchanged this watch with the defendant for a pair of candlesticks, warranted to be silver, which turned out to be base metal; and that the defendant, on the candlesticks being returned to him, had refused to deliver up the watch. Lord *Ellenborough* Ch. J. said, "Unless the contract be rescinded this action cannot be maintained; the watch remains the property of the defendant, though the plaintiff be entitled to a compensation in damages for a breach of the warranty that the candlesticks were of silver. I cannot try a question of warranty in an action of trover. The contract should be declared upon specially."

Where an agreement is made between two traders to exchange goods for goods, and a balance is struck between them; such balance is to be

(x) *Livesly v. Hood*, 2 Campb. Rep. 83.

(a) *La Neuville v. Nourse*, 3 Campb. 351. et ante, 115.

(b) 3 Campb. 299.

paid in money, otherwise there could be no end to the dealings. (c) So, where two tradesmen agree to deal with each other by way of barter, if one refuses to account, the other may arrest for the whole value of the goods which he has furnished to the party refusing. (d)

8. BARGAIN AND SALE OF GOODS WITHOUT DELIVERY.

A bargain and sale is said to be where a man makes a contract with another for the sale of goods or chattels, and at the same time makes the sale of them. (e) If the contract be executory, it amounts to an agreement; but if it be executed by actual sale, this is a bargain and sale; and where, by the terms of the contract, the money is to be paid before the delivery of the goods, or if there be no agreement as to the time of payment, and the vendee refuses to take away or accept the goods; in either case the vendor may recover the price agreed upon, by action of *indebitatus assumpsit* for goods bargained and sold. (f) So, if goods are bought at a public sale, the owner may recover the price at which they were sold, in the like form of action, even though the goods are resold in consequence of the buyer's default, in not fetching them away within the time limited by the conditions of sale. Thus, in the case of *Mertens v. Adcock*, (g) which was an action for special damages for not taking away goods bought at an auction, and for goods bargained and sold. The goods were resold under the usual printed conditions. The counsel for the defendant objected that the plaintiff could not recover for goods bargained and sold, he being in no situation to deliver the goods if he recovered the price of them. But Lord *Ellenborough* Ch. J. ruled, "that these circumstances did not prevent the plaintiff's right of recovering; for if he recovered on the count for goods bargained and sold, the defendant might maintain an action of trover for them. As soon as the lot was knocked down to him, he became the buyer; they were goods bargained and sold." The plaintiff accordingly recovered a verdict upon the Court, for goods bargained and sold. This decision, however, was doubted by *Gibbs* Ch. J. in a similar case, of *Hagedorn v. Laing*, (i), where he said, "I would not unnecessarily differ from Lord *Ellenborough*; but I much doubt whether this can in any manner be considered as a case of goods bargained and sold: here is a particular contract, that on paying for the goods, and taking them away at a certain time, the purchaser shall have the goods; but if it be a contract of bargain and sale, it certainly is subject to a condition; for if the purchaser do not take the goods

(c) *Ingram v. Shirley*, 1 Stark. 185.

(d) *Germain v. Burrows*, 5 Taunt. 259.

(e) Com. Dig. tit. Bargain and Sale, A.

(f) *Slade's case*, 4 Co. 93. Shep. Touch. 225. Skin. 647. *Peake's Cas.* N. P. 41.

(g) 4 Esp. Rep. 251. Et vid. *Greaves*

v. *Ashlin*, 5 Campb. 426. 1 Salk. 113. et

ante, 39.

(i) 6 Taunt. 165.

within a certain time, the seller may, by the terms, rescind the contract; he may resell; and if he resells, I think he shews his dissent to the contract of bargain and sale."

It has also been held, that such a form of action will lie even though the goods have been stopped *in transitu* by the seller, provided the seller is ready to deliver them on the price being paid. (*k*)

9. OF THE SALE OF GOODS BY PUBLIC AUCTION.

When goods are put up to sale by public auction, and a bidding is made, the bidder may retract his bidding at any time before the lot is *actually* knocked down to him by the auctioneer. Thus, in the case of *Payne v. Cave*, (*l*) which was an action of *assumpsit* for not paying a deposit upon a lot of goods sold at an auction; the circumstances of the case were as follow, the goods were put up in one lot at an auction; there were several bidders, of whom the defendant was the last, who bid 40*l.*; the auctioneer dwelt on the bidding, on which the defendant said, "Why do you dwell? You will not get more." The auctioneer said, he was informed the worm weighed at least 1300 *cwt.*, and was worth more than 40*l.*; the defendant then asked him, whether he would warrant it to weigh so much, and receiving an answer in the negative, he then declared he would not take it, and refused to pay for it. It was re-sold on a subsequent day's sale for 30*l.*; and the action was brought for the difference. Lord *Kenyon* Ch. J., before whom the cause was tried, being of opinion, on this statement of the case, that the defendant was at liberty to withdraw his bidding any time before the hammer was knocked down, nonsuited the plaintiff. A motion, however, was made to the Court of *King's Bench* for a rule to set aside this nonsuit, on the ground that the bidder was bound, by the conditions of the sale, to abide by the bidding, and could not retract. But the Court refused the rule, and said, "The auctioneer is the agent of the vendor, and the assent of both parties is necessary to make the contract binding; that is signified on the part of the seller by knocking down the hammer, which was not done here till the defendant had retracted. An auction is not unaptly called *locus pœnitentiæ*. Every bidding is nothing more than an offer on one side, which is not binding on either side till it is assented to; but, according to what is now contended for, one party would be bound by the offer and one not, which can never be allowed."

If goods are fairly sold at a public auction, and the buyer refuses to accept and pay for them, he is liable to an action of damages for breach of his contract: but if the owner of the goods secretly employs puffers

(*k*) *Kymer v. Suwercropp*, 1 *Campb.* Rep. 109.

(*l*) 3 *Term Rep.* 148.

to bid for him at the sale, it is a fraud on the real bidders, and the highest bidder cannot be compelled to complete the contract. This was settled in the case of *Howard v. Castle*, (m) which was an action of *assumpsit*; the declaration stated, "that the plaintiff was possessed of a leasehold estate, which, on the 23d of *March*, 1795, she put up to sale by auction on certain conditions, among which were the following; that the highest bidder should be the purchaser; that the purchaser should, at the sale, pay 25*l. per cent.* into the hands of the auctioneer, and sign an agreement to pay the remainder before the 31st of *March*; and that if the purchaser should neglect to comply with the conditions, the deposit money should be forfeited; the plaintiff should be at liberty to resell the premises; and the defendant should make good any deficiencies attending the resale, with costs. It then stated that the defendant was the highest bidder, at the sum of 357*l.*, yet that he had refused to pay the deposit, or to complete the purchase; that afterwards on the 10th of *April*, 1795, the plaintiff again put up the premises to sale by public auction, when they were sold for 279*l.*; that the deficiency, together with the costs and the deposit money, which the defendant ought to have paid at the first sale, amounted to 200*l.* 14*s.*; yet that the defendant had not paid," &c. At the trial it appeared, that at the first sale at which the defendant was declared the purchaser, there was no other real bidder, but that all the other bidders were puffers, employed by the plaintiff; that the defendant on discovering this refused to complete the contract; that at the second sale there was one real bidder of the name of *Gander*, who offered 270*l.*; and that at that sale the premises were bought in for the plaintiff at 279*l.* For the defendant, it was objected, on the authority of *Bexwell v. Christie*, Cowp. 395, that, as all the other bidders at the first auction were puffers employed by the plaintiff, the whole was a fraud and imposition on the defendant, and that he was not bound to complete his contract. The jury found a verdict for the plaintiff; but upon a motion to set aside the verdict and to enter a nonsuit, the Court were of opinion that the sale was fraudulent, and that no action could be maintained; and a nonsuit was ordered to be entered. And Lord *Kenyon* Ch. J. said, "In considering the nature of the plaintiff's demand, it becomes necessary to enquire what brought the different persons together at the auction, and on what terms they met when they went there to bid. The plaintiff's estate was advertised to be sold by auction, and one of the conditions of the sale was, that the highest bidder should become the purchaser: it was to be presumed also, that no fraud was to be practised on those who were present, to induce them to bid more than they were inclined to

(m) 6 Term Rep. 642. Vide *Bexwell* Fonb. Treat. Eq. vol. i. 227. n. x. and *v. Christie*, Cowp. 395. S. P. But see *Bramley v. All*, 3 Ves. jun. 627. contra Sugden's Vendor and Purchaser, ch. 1.

offer. At this sale the defendant bid a certain sum, and afterwards refused to complete his purchase. Now, if there were no fraud in this transaction, the plaintiff has a right to call on the defendant in a court of justice for a satisfaction for nonperformance of the agreement: but it appeared at the trial, that the whole transaction was bottomed in fraud; it was fraud from the beginning to the end; the parties did not meet on equal terms; several other persons besides the defendant bid, who represented themselves as embarking on their own judgment; but it afterwards turned out that this was false, and that this was an imposition practised by the plaintiff on the defendant; for all those other persons were authorized by the plaintiff to bid for him. I will not go into the general reasoning on this subject, because it is very ably stated by Lord *Mansfield*, in the case alluded to. Only part of that reasoning has now been adverted to by the plaintiff's counsel; but the rest of it is applicable to this case. The whole of that reasoning is founded on the noblest principles of morality and justice, principles that are calculated to preserve honesty between man and man. The acts of parliament that have been referred to, did not intend to interfere with this point, but to leave the civil rights of mankind to be judged of as they were before. In the case cited, Lord *Mansfield* mentioned an instance in which the owner may legally and fairly bid at the auction, namely, where, before the bidding begins, he gives public notice of his intention; and in such a case no duty is to be paid under the acts of parliament that have been referred to. The circumstance of puffers bidding at auctions has been always complained of; if the first case of this kind had been tried before me, perhaps I should have hesitated a little before I determined it; but Lord *Mansfield's* comprehensive mind saw it in its true colours, as founded in fraud; he met the question fairly, and made a precedent which I am happy to follow."

If a party at a public sale become the highest bidder by any improper conduct or representation, which has the effect of deterring others from bidding, the sale is void as against such party. Thus, in the case of *Fuller v. Abrahams*, (a) where it was proved, that a barge being put up for sale by auction, the plaintiff addressed the company present, saying, he had a claim against the late owner, by whom he said he had been ill-used; whereupon no one offered to bid against the plaintiff; but the auctioneer refusing to knock down the barge upon the plaintiff's single bidding, a friend of the plaintiff's then bid a guinea more; and the plaintiff then made a second and higher bidding, amounting, however, to only one-fourth of the prime cost of the barge. The auctioneer being indemnified by the vendor, who had taken the barge in execution, refused to deliver the barge to the plaintiff. The Court were

(a) 5 Brod. & Bing. 116.

clearly of opinion, that a sale under these circumstances could not be supported.

We have already seen, (o) that an auctioneer is considered in law as an agent both for the buyer and the seller. But if he sells goods, and do not disclose his principal, he is liable to an action at the suit of the purchaser for the completion of the contract of sale. (p) Where several distinct lots are sold at the same auction to the same person, each lot is a distinct contract. (q) And an auctioneer has such a special property in goods sold by him, as will enable him to maintain an action for the price of the goods against the vendee, even though the goods were sold at the house of the auctioneer's employer, and were known to be his property. (r) But if an auctioneer sell the goods of B. as the goods of A. and the buyer pay the price to A. the auctioneer cannot recover the price from the buyer. (s) Where no payment, however, is made by the buyer, and the auctioneer bring an action against him for the price of the goods, the buyer may set off a debt due from A. to him. (t)

It was also noticed in a former part of this chapter, (u) that a clerk of an auctioneer is not authorized to act in the absence of his master as agent for the vendor, unless the vendor empowers him so to do. And the authority of an auctioneer, as agent, is put an end to by the completion of the sale; and nothing done by him afterwards relative to the subject-matter of it, will bind his principal. (v) So, verbal declarations made by the auctioneer contrary to the printed conditions of sale, are of no validity, and cannot be admitted in evidence to contradict the printed conditions; (w) for the printed conditions of sales by auction are the terms of the contract between the buyer and seller, and are in all cases binding on the parties; and they are sufficiently made known to the bidders by being posted up in the public sale room under the auctioneer's box. (x)

The sales of the *East India Company* being subject to a regulation that any buyer not making good the remainder of his purchase-money on or before the day limited for such payment, shall forfeit the deposit, "and shall be rendered incapable of buying again at any future sale until he shall have given satisfaction to the court of directors." The term "satisfaction" was held to mean *pecuniary compensation for the nonperformance of his agreement to pay on the appointed day*; (y) and that a buyer having made default on the day, but afterwards, within a further time given to him by the company, paid the remainder of the

(o) Ante, 103.

(p) *Hanson v. Roberdeau*, Peake, 120.

(q) *Emmerson v. Heelis*, 2 Taunt. 38.

(r) *Williams v. Millington*, 1 H. Bl. 81.

(s) *Coppin v. Walker*, 7 Taunt. 237.

(t) *Coppin v. Craig*, Ibid. 243.

(u) Ante 103.

(v) *Seton v. Slade*, 7 Ves. jun. 276.

(w) *Gunnis v. Erhart*, 1 H. Bl. 289.

(x) *Meenard v. Aldridge*, 3 Esp. 271.

(y) *Eagleton v. The East India Company*, 3 Bos. & Pul. 55.

purchase-money, with interest, might maintain an action against the company for refusing to allow him to become a bidder at their sales; such sales being by 9 & 10 W. 3. c. 44. s. 69. declared to be public and open sales.

Where the conditions of sale by auction were, that the goods should be cleared away at the expence of the buyer in 14 days, the price to be paid on or before delivery; and that if any lots remained uncleared after the time allowed, the deposit-money should be forfeited, the goods resold, and the loss on the resale made good by the purchaser. The broker gave a bought note, which allowed 14 days for receiving and delivery. And it was held, (z) that the buyer only had 14 days to take away the goods and that the seller was bound to deliver them immediately.

By the statutes 17 Geo. 3. c. 50. s. 10., and 19 Geo. 3. c. 56. s. 12., it is enacted, that if the owner of any estate, goods, or effects, put up to auction, shall become the purchaser by himself or his agent, without fraud, the *commissioners of Excise, &c.* shall be authorized to make an allowance to such owner of the duties arising on such biddings, provided notice be given to the auctioneer before the bidding, both by the owner and the agent, of the appointment of the latter; and provided such notice be verified on the oath of the auctioneer, as well as the fairness of the transaction to the best of his knowledge and belief. And by statute 28 Geo. 3. c. 37. s. 20., the notice to the auctioneer is required to be in writing; but by 42 Geo. 3. c. 93., a notice by the steward or known agent of the owner is sufficient. And by 19 Geo. 3. c. 56. s. 11. if any sale by auction of estates or goods shall be rendered void by the person for whose benefit such estate or goods were sold, having no title, the *Commissioners of Excise, or Justices of Peace*, are authorized to relieve the party from their payments. (a)

10. OF THE ACTUAL OR SYMBOLICAL DELIVERY OF GOODS SOLD, EITHER TO THE VENDEE PERSONALLY, OR AT HIS PREMISES, OR TO A PARTICULAR CARRIER, WHARF, OR OTHER PLACE; AND AT WHOSE RISK THEY ARE WHILST IN THEIR TRANSIT; AND OF THE VENDOR'S RIGHT TO RECOVER THE PRICE.

Upon a sale of goods, the vendee either takes them away himself, or sends for them at his own expence; or the vendor either delivers them to the vendee's premises, or to some particular carrier, or wharf, or other place either agreed upon, or according to the known and general usage of trade; and the expence and risk of the conveyance is usually borne by the vendee. Therefore, if a person orders goods of a

(z) *Ante*, 108.

(a) See 51 Geo. 3. c. 95. s. 1.

trader living at a distance, and directs that they shall be sent to him by a carrier or other conveyance, without naming any one in particular, a delivery of the goods to a known carrier, or trading vessel going either to the town or nearest place to where the vendee resides will, in effect, amount to a delivery to the vendee, in whom the property is immediately vested; and he must stand all risk of conveyance: and he alone can maintain an action for any injury done, or other accident happening to the goods in their transit. (b) And, so where goods are sent abroad, the property vests in the consignee from the time they are shipped. (c) The only exception to the purchaser's right over the goods is, that the vendor, in case of the former becoming insolvent, may stop them *in transitu*. (d) And the vendee, in such case, is liable to pay for the goods upon the delivery thereof to the carrier. Thus, in the case of *Vale v. Bayle*, (e) which was an action of *assumpsit* for goods sold and delivered: And at the trial, a letter from the defendant to the plaintiff was produced, containing a commission to the plaintiff for the goods in question, after which was added the following postscript; "Pray be expeditious in sending them; and instead of letting them go by the way of *Bristol*, where many things you have sent me have been detained, send them by land-carriage." The goods were delivered to the book-keeper of the *Birmingham* carrier, to be sent from thence by way of *Coventry*, to the defendant, who lived at *Carmarthen*; and it was proved, that there was no other mode of conveyance by land-carriage: the goods were lost on the road. The Court determined, that the delivery of the goods to the carrier was a delivery to the defendant; and that the plaintiff was entitled to recover.

So, in the case of *Cooke v. Ludlow*, (f) which was also an action of *assumpsit* for goods sold and delivered, and goods bargained and sold: At the trial a verdict was found for the plaintiff, damages 12*l.* 6*s.* 6*d.*, subject to the opinion of the Court of *Common Pleas* upon the following case: "On the 23d of *November*, 1802, the plaintiffs, who were partners and agricultural-implement makers, received a letter by the post from the defendant, dated *Winterbourne Court* near *Bristol*, in which he writes, 'Three or four years since I had a patent chaff-cutter of you, which for some time answered my purpose very well, but it is latterly got out of order. I therefore beg the favour to send me another as soon you can after you receive this, as I am in the habit of using a great deal of chaff; you will be so good as to send two or three pair of knives. Any conveyance by which it will reach *Bristol* will be convenient to me, as I am only six miles from it. I am,' &c. And in a post-

(b) Vide 3 Bos. & Pul. 584. *Anderson v. Hodgson*, 5 Price, Rep. 630. 2 Campb. 639. 2 Stark. 33. *Dawes v. Peck*, 8 T. R. 330.

(c) 3 Campb. 36. 1 East, Rep. 525.

(d) Vide post. sect. 11.

(e) Cowp. 294.

(f) 2 New Rep. 119.

script to that letter the defendant writes : ' I will thank you for a line, mentioning when you send the chaff-cutter, that I may know when to expect it, and where to send for it; and the sooner I can get it the more agreeable, as I am much inconvenienced for want of chaff.' On the 17th *December* following, the plaintiffs sent the chaff-cutter and knives directed to the defendant, to *Symond's Wharf, Tooley Street*, at which wharf some of the *Bristol* vessels load, and received from the wharfingers there a receipt of the same in the following words : ' The *Commerce*, *Cha. Farquarson*, for *Bristol*, 17th *December*, received 1s. 6d. *J. M.*' On the same 17th *December* the plaintiffs, per post, advised the defendant as follows : ' The *Commerce* sailed from the port of *London* in *January*, 1803, to *Bristol*, and arrived there, and *Pollard and Son* are agents to all *Bristol* vessels loaden at *Symond's Wharf* for *Bristol*, and receive all the goods arriving by them.' From the month of *January*, 1803, until the arrival of the *Commerce* at *Bristol*, the defendant made continual inquiries of the agents and consignees at *Bristol*, if she had brought the chaff-cutter in question. The package containing the chaff-cutter was not on board this vessel on its arrival at *Bristol*. It is the invariable custom at *Symond's* and other wharfs, when goods are left there to go to any place by a vessel, to give a receipt for the goods as going by the vessel then loading, without regard to the capability of the vessel loading to contain all the articles for which receipts are given; and if there are more goods than such vessel will contain, to load such goods, as cannot be conveyed in such vessel, on board the next vessel in turn that sails from the wharf. The *Commerce* was the vessel loading at the wharf at the time the chaff-cutter was delivered to the wharfinger; but such vessel was fully loaded with other goods in turn, which came there before the chaff-cutter; so that the chaff-cutter, and other goods delivered at the same time, to be sent to *Bristol*, were left out of that vessel, and were afterwards by the wharfinger put on board another vessel called the *Nancy*, which sailed from *Symond's Wharf* on the 13th *April*, 1803, for *Bristol*, and duly arrived at *Pollard's Wharf* with the chaff-cutter on board. The chaff-cutter was landed from the *Nancy* at *Pollard's Wharf, Bristol*, and still remains there. The wharfinger did not give notice either to the consignor or to the consignee that the chaff-cutter had not been taken on board the *Commerce*, or that it had been sent by any other ship. No correspondence or communication whatever passed between the parties until about the middle of the following year, (1804,) when the plaintiffs applied for payment of their demand; and in a short time afterwards, viz., on the 20th *July* in that year, received a letter from the defendant, stating that he had not received any chaff-cutter whatsoever, though he had made repeated inquiries at *Pollard's Wharf* for the same, from the receipt of the plaintiffs' invoice, until the arrival of the *Commerce* at *Bristol*, without the chaff-cutter, and

therefore had got his old one repaired. On the 22nd of November, 1804, the plaintiffs wrote to the defendant, stating that they would not agree to sustain any loss, and informing him that by inquiry made that morning at *Symond's Wharf*, they found that the chaff-cutter was not forwarded by the *Commerce*, but was put on board the *Nancy*, which left *London* on the 13th April, 1803; and that *Pollard and Son*, on the quay at *Bristol*, were the agents for that ship. This was the first intimation which the defendant received from the plaintiffs, that the chaff-cutter had been sent by the *Nancy*." The Court, after argument, determined, that the plaintiff was entitled to recover. And *Heath Just.* said, "I do not consider the wharfinger as in any degree the agent of the plaintiffs; he is the agent of the defendant by whose order and direction the goods were sent. No negligence is imputable to the plaintiffs in not inquiring after the goods. They had no notice of the nondelivery until July, 1804. Nothing is more common than in the case of waggons, where one is full, to send the goods by the next."

So, a delivery of goods on board a ship, according to order, is a sufficient delivery to entitle the vendor to recover for goods sold and delivered. Thus, in the case of *Groning v. Mendham*, (g) which was an action for goods sold and delivered to recover the price of 50 casks of smalts, which had been ordered by the defendant of the plaintiff's house at *Hamburgh*; the plaintiff shipped the casks at *Hamburgh* on board the *Euphrates*, Captain *Stanford*, making them deliverable by the bill of lading, to order or assigns; the plaintiff at the same time advised the defendants by letter of the shipment, and inclosed the bill of lading indorsed, together with an invoice, and valued upon him by bill at two months, for 531*l.* 10*s.* On the arrival of the ship in the river, after she was reported at the custom-house, the defendant produced the bill of lading to the captain, and demanded a delivery of the goods, tendering him the freight and charges; but the captain withheld the goods in consequence of the defendant's having refused to accept the bill; the defendant thereupon brought trover against the captain, and recovered. Under these circumstances, the Court determined, that there was a sufficient delivery. And *Holroyd Just.* said, "I am of opinion in this case, that the defendant, by bringing trover against the captain, has affirmed the delivery to himself; the delivery on board the ship being a complete delivery, he brings trover, the form of which action required him to state that he was possessed of the goods, and that the captain wrongfully took them out of his possession; and the property in the goods is the very gist of the action. Having thus brought trover, in which he could not have recovered unless the goods were proved to be his property, it seems that he cannot now say that they were not delivered to him."

(g) 5 Maule & Selw. 189.

Where goods above the value of five pounds are ordered to be sent by a carrier who advertises that he will not be answerable for such goods unless entered and paid for as such, the vendor is bound to enter and pay for the goods accordingly. Thus, in the case of *Clarke v. Hutchins*, (h) which was an action for goods sold and delivered; the price of which was 51*l.* The defendant, who lived at *Gosport*, ordered goods from the plaintiff, who lived at *Plymouth*, and who sent them accordingly to a receiving house of a vessel trading for this purpose between the two places, the owners of which had published cards, and sufficiently established a notoriety in the place that they would not be answerable for any package above 5*l.*; but the plaintiff made no special entry or payment pursuant to the notice. The goods, in fact, were never delivered to the defendant, and no further account was given of them, and he refused to pay for them, on the ground, that by the plaintiff's neglect in not making a special entry of them pursuant to the notice, he could have no remedy over against the carriers. The Court determined, that the plaintiff was bound to enter the goods specially. And Lord *Ellenborough* Ch. J. said, "The plaintiff cannot be said to have deposited the goods in the usual and ordinary way, for the purpose of forwarding them to the defendant, unless he took the usual and ordinary precaution, which the notoriety of the carrier's general undertaking required, with respect to goods of this value, to insure them a safe conveyance; that is, by making a special entry of them. He had an implied authority, and it was his duty to do whatever was necessary to secure the responsibility of the carriers, for the safe delivery of the goods; and to put them into such a course of conveyance, as that in case of a loss the defendant might have his indemnity against the carriers."

So, in the case of *Buckman v. Levi*, (i) which was an action for goods sold and delivered. The facts were, that the plaintiff being a chair-manufacturer in *London*, and who had been in the habit from time to time of supplying chairs to the defendant, an upholsterer at *Wells*, in *Norfolk*, these chairs had been carried by the plaintiff to *Harrison's Wharf, Irongate*, from whence they were forwarded by water to the defendant. Sometimes they were booked at the wharf, and sometimes they were not, but till the parcel in question, which never reached him, they had always arrived safe. A servant of the plaintiff was the only witness to speak to the delivery of the chairs in question, and he stated, that he took them to *Harrison's Wharf*, and left them on the premises there, with a direction to the defendant, piled up among other goods; he had no receipt for them, nor was any entry respecting them made in the wharfinger's books; he saw a man upon the wharf whom he believed to

(h) 14 East Rep. 475. Sed vide *Cothay v. Tute*, 3 Campb. 129. (i) 3 Campb. 414.

be a servant of the wharfinger, but he did not know his name, and should not be able to recognize his person; he had no conversation with the wharfinger, or any other person upon the premises. It was objected for the defendant, that here was no sufficient evidence of a delivery to charge him, as the goods had not been booked in his name at the wharf; and he would have no remedy over against the wharfinger. Lord *Ellenborough* Ch. J. said, "A delivery of goods to a carrier or wharfinger with due care and diligence, is sufficient to charge the purchaser; but he has a right to require that in making this delivery, due care and diligence shall be exercised by the seller. Before the defendant can be charged in the present instance, he must be put into a situation to resort to the wharfinger for his indemnity; but no receipt was taken for the chairs: they were not booked, and no person belonging to the wharf is fixed with a privity of there being left there. The plaintiff was bound to procure them to be booked, or to deliver them to the wharfinger himself, or some person who can be proved to be his agent for the purpose of receiving them." A verdict was found for the defendant.

Where a sale is made of 100 bags of hops at a certain price per hundred weight, this is an entire contract; and a delivery of part will not entitle the seller to an action until the whole has been delivered. (*k*) So, in the case of *Walker v. Dixon*, (*l*) which was an action for goods sold and delivered; the facts were, that the plaintiff agreed to sell to the defendant 100 sacks of flour at a certain price per sack; 10 sacks to be sent immediately on trial; to be accepted or rejected in two days from the sending the 10 sacks: 10 sacks had accordingly been sent, of which the defendant retained four, sending six back because they were of secondary quality, and desiring that the error might be rectified. Ten other sacks had afterwards been sent by the defendant to the wharf of *Raymond and Storey*; these were approved of by the plaintiff, and he took two of them, leaving the remainder at the wharf, to await his further orders; and these were afterwards taken away by the plaintiff, who refused afterwards to complete his engagement for the 100 sacks. The defendant afterwards insisted upon his delivering the remainder of the flour, and tendered him the whole amount, giving him notice that if he did not deliver the rest he would purchase the same quantity elsewhere and charge him with the difference. The action was brought for the price of the sacks so delivered. But Lord *Ellenborough* Ch. J. said, "This is the case of an entire contract for 100 sacks; part of these were delivered, to which objection might have been made as to quality; but the party did not stand upon that objection, but offered to pay the whole. And since the defendant was ready to perform the

(*k*) *Waddington v. Oliver*, 2 New. Rep. 61.

(*l*) 2 Stark. 281.

contract, and to pay for the whole at the price agreed upon, including the four sacks which were objected to, I am of opinion, that the plaintiff could not afterwards split the contract, and bring his action for part only. If the defendant had insisted upon an abatement being made, in respect of the first four, I might have thought differently." The plaintiff was therefore nonsuited.

So, if an agent for the sale of horses sells to A., in one lot, and at an entire price, a horse belonging to B., and another belonging to C., warranting both horses to be sound, A. cannot maintain an action of *assumpsit* against B. for the unsoundness of the horse which belonged to the latter, declaring as upon a sale of one horse; since the contract concerning the two horses was entire. (m)

Where goods are ponderous and incapable of being handed over from one to another, there need not, as we have already seen, (n) be an actual delivery; but it may be done by that which is tantamount, such as a delivery of the key of a warehouse in which the goods are lodged, or by delivery of other indices of property, as a delivery-order upon a wharfinger, &c. But this species of delivery will be more fully considered in the following division of the present chapter.

Goods packed in the cloths of the vendee, and set apart for him in the vendor's warehouse, does not amount to a delivery, if part of the terms of sale are, that they shall not be carried away till paid for. Thus, in the case of *Goodall v. Skelton*, (o) which was an action for goods sold and delivered; the material facts were, that the plaintiff had agreed to sell a quantity of wool to the defendant, that a shilling earnest was paid on the part of the defendant to bind the bargain, that the wool was packed in cloths furnished by the defendant for that purpose, and left at a hovel belonging to the plaintiff, and that the defendant was to send his waggon in a few days to take it away; but while the defendant's servant was weighing and packing it, and proposing to the plaintiff to fix the time when the waggon should come, the plaintiff declared "that it should not go off the premises till he had the money for it." The Court held that this did not amount to a delivery, so as to entitle the vendor to maintain this form of action. And *Buller Just.* said, "Here the evidence is, that the plaintiff peremptorily insisted on not parting with the goods till he was paid; clearly therefore there was no delivery."

So, in the case of *Owenson v. Morse*, (p) where the plaintiff bought some plate at the shop of the defendant, a silversmith, and the defendant, by the plaintiff's directions, delivered the plate to an engraver to engrave the plaintiff's arms on it; both parties directing the engraver to bring back the goods to the defendant, who was to pay for the engraving.

(m) *Symonds v. Carr*, 1 Campb. 561.

(n) *Ante*, 89.

(o) 2 H. Bl. 516.

(p) 7 Term Rep. 64.

the Court held that there could be no delivery to the plaintiff, unless the engraver could be considered as his agent or servant; but that there was no pretence for considering him in that situation, as he was employed by the defendant and not by the plaintiff, and as the plate was to be returned to the defendant who was to pay for engraving it.

The subject of the delivery of goods will be further considered under the following sub-division of this chapter.

11. WHEN THE PROPERTY IN GOODS SOLD IS VESTED IN THE BUYER; AND AT WHOSE RISK THEY REMAIN WHILST IN THE POSSESSION OF THE SELLER: ALSO OF THE SELLER'S LIEN OR RIGHT TO RETAIN, OR STOP THEM *IN TRANSITU*.

The different branches of the former subdivision, as well as the present, are so immediately connected together as to render it somewhat difficult to treat of each part separately, without using repetition; yet the subject embraces such variety of matter as to require the parts to be divided in order to render the subject clear and intelligible; and therefore I propose, in the present section, to consider it under the following heads; namely, first, when the property in goods sold is vested in the buyer; secondly, the vendor's lien or right to retain possession of the goods after the sale of them; and thirdly, the vendor's right, upon the event of the insolvency or bankruptcy of the buyer, to stop the goods *in transitu*.

1. WHEN THE PROPERTY IN GOODS SOLD IS VESTED IN THE BUYER.] — As a general rule it is said, (*q*) that where a thing sold is in existence and in the possession of the seller, and the sale is made by words of present contract, and the price paid, the legal property shall pass in the thing sold although there be no actual delivery: but a contract may be either executed, as if A. agrees to change horses with B., and they do it immediately; in which case the possession and the right are transferred together; or it may be executory, as if they agree to exchange next week; here, the right only vests, and their reciprocal property in each other's horse is not in possession, but in action; for a contract executed, which differs nothing from a grant, conveys a *chose* in possession, a contract executory conveys only a *chose* in action. So, where one sells a horse for money, and the buyer pays earnest, or signs a note in writing of the bargain, and the horse afterwards, and before the delivery or payment of the price, dies in the stable of the vendor, the latter is entitled to the money, because by the contract the property in the horse was in the vendee. (*r*) So, where money or other

(*q*) Noys, Max. ch. 42. Com. Dig. tit. Biens, D. 5. 2 Bl. Com. 448. *Back v. Owen*, 5 T. R. 409. Hob. 41. Et vide ante, 78. (*r*) Vide same references as in the last note.

thing is given upon a sale to bind the bargain, the property in the article sold is so far vested in the buyer that the vendor cannot sell them to another without a default in the vendee; and therefore if the vendee do not come and pay for the goods and take them away, the vendor ought to request him; and if he refuses to do so, in a convenient time, the agreement may be considered as abandoned on his part, and the vendor is at liberty to sell them to any other person. (s) It is, however, difficult in many cases to determine at what precise period the property in goods sold, is so absolutely vested in the buyer, as to prevent the seller from detaining or stopping the goods *in transitu*. But, generally speaking, it may be observed, that if upon a sale, the goods are transferred and delivered into the actual possession of the vendee, the property is immediately and absolutely vested in him, and the vendor cannot afterwards seize or take them upon the insolvency of the vendee. And if goods are so ponderous that they cannot be delivered from hand to hand; or, it is not convenient to the parties that there should be an immediate and actual delivery of the whole of the goods, we shall presently see that a delivery either of part of them, or a delivery of a key of the warehouse in which they are deposited, or any other symbolical delivery of the goods, will be equivalent to, and have the same effect in law, as an actual delivery; and that such delivery will vest the property in the vendee. We have just seen (t) that a delivery of goods to a carrier is a delivery to the vendee, and that such delivery vests the property in him. So, with regard to ponderous and other goods, it has been shewn what kind of acceptance and delivery will satisfy the statute of frauds. (u) It will therefore now be necessary to consider what other acts done by the vendor will vest the property in the vendee. And first, it has been held, that a *part* delivery of an entire quantity of goods sold, vests the *whole* in the buyer. Thus, in the case of *Hammond v. Anderson*, (v) where a quantity of bacon had been sold at one entire place, and lodged at a wharf; and possession given by the wharfinger to the vendee four days after the sale, when the vendee weighed the whole of the bacon, and took away part of it: it was held that the property vested in the vendee, though by the custom of the trade the vendor was to pay the charges of warehousing for fourteen days after the sale.

So, the delivery of part of a cargo of goods, where there appears no intention, either previously or at the time of the delivery, to separate that part from the rest, is in law a delivery of the whole cargo. (w) But, where goods are lying in bulk, and a sale is made either of the whole,

(s) *Per Holt Ch. J.* 1 Salk. 118. Bul. Ni. Pri. 50. 6 Mod. 162. Skin. 647. et ante.

(t) Ante, 137.

(u) Ante, 87.

(v) 1 New Rep. 69.

(w) *Shebey v. Hayward*, 2 H. Bl. 509.

or of part of them, and something remains to be done, either to ascertain the quantity, or to separate the part sold from the bulk, as the weighing, or drawing off, &c.; the property in such case does not vest in the buyer until this be done.

So, if parcel of the goods bought are weighed, or drawn off, and delivered, or placed to the account of the vendee, he paying warehouse rent for the same, the property of such part only is vested in the buyer, and not the remainder. Thus, in the case of *Hanson*, assignee of *Wallace v. Meyer*, (x) which was an action of trover. A quantity of starch was lying at the warehouse of a third person, supposed to be about four tons, belonging to the defendant, were sold by him to *Wallace* before his bankruptcy, at 6*l.* per cwt., by bill at two months, and 14 days allowed for the delivery, and the weight to be ascertained. The customary mode of delivery is, that the seller gives the buyer a note or delivery order addressed to the warehouse-keeper, to weigh and deliver the goods to the buyer; this note is taken to the warehouse-keeper, and is his authority to weigh and deliver the goods to the vendee. A delivery note was accordingly given and lodged with the warehouse-keeper, and part of the starch was weighed and delivered to *Wallace*; the remaining quantity, which was the subject of the action, continued at the warehouse in the name and at the expence of the defendant till they were weighed and delivered; and the residue also afterwards continued there in like manner unweighed, in his name, and charged to his expence. *Wallace* became bankrupt; and the defendant, after the bankruptcy, took away the remainder of the starch that had not been so weighed. A verdict was found for the defendant, subject to the opinion of the Court; which was afterwards given in his favour: and Lord *Ellenborough*, in delivering that opinion, said, "By the terms of the bargain, two things in the nature of conditions or preliminary acts on the part of the bankrupt, necessarily preceded the absolute vesting in him of the property contracted for; the first of them, is one which does so according to the generally received rule of law in contracts of sale, viz., the payment of the agreed price or consideration for the sale; the second, which is the act of weighing, does so in consequence of the particular terms of this contract, by which the price is made to depend upon the weight: the weight therefore must be ascertained in order that the price may be known and paid; and unless the weighing precede the delivery, it can never, for these purposes, effectually take place at all. In this case a partial weighing and delivery of several quantities of the starch contracted for had taken place; the remainder of it was unweighed and undelivered; and of course no such bill of two months for the price, so depending on the weight, could yet

(x) 6 East Rep. 614. et vide *Busk v. Davis*, 2 Maule & Sel. 397. *Wallace v. Bracey*, post. 147.

be given. The question is, what is the legal effect of such part-delivery of the starch on the right of property, in the undelivered residue thereof? On the part of the plaintiffs, it is contended, that a delivery of part of an entire quantity of goods contracted for, is a virtual delivery of the whole, so as to vest in the vendee the entire property in the whole; although the price for the same should not have been paid: this proposition was denied on the part of the defendant, and many authorities have been cited on both sides; but without deciding at present what might be the legal effect of such part delivery, in a case where the payment of price was the only act necessary to be performed in order to vest the property; in this case another act, it will be remembered, was necessary to precede both payment of price and delivery of the goods bargained for, viz. weighing. This preliminary act of weighing it, certainly never was in the contemplation of the sellers to waive, in respect of any part of the commodity contracted for. The order stated in the case from the defendant to the warehouse-keeper, is to weigh and deliver all his starch. Till it was weighed, he as his agent was not authorised to deliver it; still less were the buyers themselves, or the present plaintiffs, their assignees, authorised to take it by their own act from the warehouse; and if they could not so take it, neither can they maintain this action of trover founded on such a supposed right to take, or, in other words, founded on such a supposed right of property in the subject matter of this action. If any thing remain to be done on the part of the seller, as between him and the buyer, before the commodity purchased is to be delivered, a complete present right of property has not attached in the buyer; and of course this action, which is accommodated to, and depends upon such supposed perfect right of property, is not maintainable."

So, in the case of *Rugg v. Minetti*, (y) where a quantity of turpentine in casks was sold by auction in lots, at a certain price per cwt., each cask, except the two last, being marked at a certain weight, at which they were to be taken by the buyer, the two last lots being reserved to fill up the rest, and being on that account sold at uncertain quantities, and after the sale some of the casks were filled up; but before the remainder were filled, the whole was consumed by fire: it was decided, that the property in those casks which had been filled up, was transferred to the buyer, but that those which had not been filled up, still remained the property of the seller. And, in the case of *Withers v. Lyss*, (z) where a particular parcel of goods lying in a warehouse, was sold at an agreed price per cwt. (the weight at the time of the sale being uncertain,) to be paid for by a bill of exchange. The vendor gave the vendee an order on the warehouseman for weighing and de-

(y) 11 East Rep. 210.

(z) 4 Campb. 237.

livering the goods. It was held by Gibbs Ch. J. at nisi prius, that the property did not pass to the vendee, as *something still remained to be done*; and that it made no difference that the whole of the goods was sold; the principle being, that while any thing remains to be done to ascertain the price, the possession is not transferred to the purchaser; for until the goods were weighed, the bill of exchange which was to be given in payment for them could not be drawn. But, in the case of *Whitehouse v. Frost*, (a) which was an action of trover, brought by the assignees of *Townsend*, a bankrupt, in respect of a sale to *Townsend* of 10 tons of oil, parcel of a bulk of 40 tons lying in a cistern in an oil-house at *Liverpool*, for which he was to give his acceptance payable at four months. A bill of parcel was rendered to *Townsend* stating where the oil was, and also that it was at his risk. A delivery order was given to *Townsend* and lodged by him at the oil-house; and he accepted the bill for the amount. *Townsend* became bankrupt before the oil was drawn off, and before the bill became due; and at the time of his bankruptcy the oil was still lying in the cistern, mixed with the other oil. The question, which was argued at the bar, was, whether these facts amounted to a delivery of the oil to *Townsend*, so as to vest the property in him. It was contended on the part of the defendants, that *something remained to be done*, namely, the separation of the ten tons from the general mass of oil in the cistern, before the property in the oil could be transferred from the vendor to the vendee: but Mr. Just. *Le Blanc*, before whom the case was tried, said, "That the objection only applied, where something remained to be done as between the buyer and the seller, or for the purpose of ascertaining either the quantity or the price; neither of which remained to be done in this case; and that, therefore, though something remained to be done, as between the vendee and the persons who retained the custody of the oil, before the vendee could be put into separate possession of the part sold; yet, as between him and his vendors, nothing remained to perfect the sale." And the Court of King's Bench afterwards determined, that the property had vested in *Townsend* before his bankruptcy.

A similar case, however, was soon afterwards brought before the same court, of *Wallace v. Breeds*, (b) where it appeared, that 50 out of 90 tons of *Greenland* oil, lying at a wharf in casks were purchased, and a delivery order given and lodged; but it was proved, that before *Greenland* oil is delivered, it is the constant custom to have the casks searched by a cooper employed by the seller; and it is also the custom for a broker, on behalf both of the buyer and seller, to attend to make a minute of the foot-dirt and water in each cask; and the casks are then filled up by the seller's cooper at the seller's expence, and delivered in a com-

(a) 12 East Rep. 614.

(b) 13 East Rep. 522.

plete state, containing the quantity sold. The buyer became bankrupt, and at the time of the bankruptcy none of these customary acts had been done; the seller therefore countermanded his delivery order. And the Court determined, that the property in the 50 tons of oil was not vested in the buyer: and upon the case of *Whitehouse v. Frost* being cited, Lord *Ellenborough* Ch. J. said, "The difference between this case, and that of *Whitehouse v. Frost* is, that there, nothing remained to be done by the seller in order to complete the sale as between him and the buyer; but here it is expressly found that some things did remain to be done by the seller, which were to precede the delivery to the buyer; the casks were to be searched by a cooper employed by the seller; and after the foot-dirt and water in each cask were ascertained by the broker attending on behalf of both parties, the casks were to be filled up by the seller's cooper at his expence, and delivered in a complete state, containing the quantity sold. These were material acts to be done by the seller before the delivery to the buyer; and the Courts have frequently laid hold of circumstances like these, to retain the property in favour of the unpaid seller: and before the oil was measured out, and these things were done, the delivery was countermanded."

The case of *Whitehouse v. Frost*, has, however, been very much shaken, if not overruled, by the two following cases, viz., *Austen v. Craven*, (c) in which it was expressly determined, by the Court of Common Pleas, that, upon a sale of a particular quantity of sugar of a certain quality, which was not separated from the general stock of the buyer, no action of trover could lie for these sugars; they never having been separated from the general stock of the seller. And, in the case of *White v. Wilks*, (d) it was also determined by the same Court that upon a sale of part of a large quantity of oil to be drawn out of cisterns, no property passes until the oil is actually drawn off. In this case, the determination of the Court of King's Bench in *Whitehouse v. Frost*, and other cases being pressed upon the Court in argument, Lord Ch. J. *Mansfield* said, "In the case of *Austen v. Craven*, this Court, in direct opposition to the cases cited, held that trover would not lie for sugars which had not been specifically separated from the vendor's stock; and although the objection was not made fully comprehensible upon the first trial of that cause, yet as soon as it came to be stated in Court, it became too clear to be resisted; and although the case was an extremely hard one, inasmuch as the very persons who refused to deliver the sugars, had told the purchaser that he might safely pay the bankrupt for them, we held that he could not recover, and unless it can be shown that that decision was wrong, it is impossible that the plaintiff should prevail in this case. The objection here is, that no specific quantity of

(c) 4 Taunt. 644.

(d) 5 Taunt. 176.

oil was sold; the quantity agreed to be sold was mixed with a much larger quantity; not and only that, but it was mixed with several different quantities: how was it to be separated? In the cases where the payment of rent for warehouse room has been an ingredient to make a complete sale, the question has always been on the constructive delivery, not on the separation of the goods from the mass: in all those cases, there has been a complete separation of the goods sold, and the only doubt has been, whether there were a symbolical delivery. This, too, is the case of a liquid, which makes the difficulty much greater than in the case of a solid substance." And *Heath Just.* said, "The payment of rent is not equivalent to a delivery of the goods. Suppose a part of the oil in some of these cisterns was lost or burnt, who is to know whether it is the vendor's or the purchaser's oil that is destroyed? We do not pretend to reconcile the case of *Austen v. Craven* with that of *Whitehouse v. Frost*, it would be impossible so to do; and unless the plaintiff can overthrow that case, it is impossible to grant a new trial here: besides, there are numbers of old cases in which it has been held, that the plaintiffs could not succeed for want of a sufficient certainty and separation of the goods sold." And in conformity to these latter determinations, it has been held, that on a sale of a certain quantity of hemp, forming part of a larger quantity, the property does not pass from the vendor to the vendee till the hemp is weighed off. (e) So, where it was proved to be the custom upon the sale of goat-skins, for the seller to count the number of skins in each bale; and after the sale of a certain quantity of skins, but before they had been counted they were consumed by fire. It was determined, that the property had not passed to the purchaser, and that the loss must fall upon the seller. (f)

But if goods, whilst lying either at a public or private wharf or warehouse, or at the docks, are sold, and they are at that time in a state fit for immediate delivery, but it is more convenient to the purchaser, that some symbol or representative of the goods should be given, than to make an actual delivery of them; such a mode of delivery is deemed equivalent to, and as effectual, in point of law, as an actual delivery, and will vest the property absolutely in the purchaser. Thus, in the case of *Greaves v. Hepke*, (g) which was an action for money paid. And, at the trial, it appeared that the plaintiffs, who were brokers at *Liverpool*, by order and on account of the defendants, who were merchants in *London*, sold to one *Maxwell*, on the 4th *September*, 1817, a quantity of coffee then lying in a warehouse at *Liverpool*. On the 13th *September*, *Maxwell* paid to the plaintiffs the purchase money, and received from them the usual

(e) *Shepley v. Davis*, 5 Taunt. 617. (g) 2 Barn. & Ald. 131. et vide ante
Busk v. Davis, 2 M. & S. 397. 146.

(f) *Zagury v. Furnell*, 2 Campb. 240.

order to the warehouse-keeper, signed by the original importer, for the delivery of the coffee; by which he was enabled to obtain *immediate* possession. The plaintiffs settled with the defendants in account for the same. The custom at *Liverpool* was, that the purchaser of such goods should be allowed to let them remain in the warehouse for two months, and the rent for that period was to be paid by the seller. Before two months had elapsed the goods were distrained by the landlord for rent; and the plaintiffs, in order to redeem them, paid the rent, and brought this action to recover the money from the defendants. The learned Judge *Bayley*, before whom the cause was tried, nonsuited the plaintiff; and the Court afterwards confirmed the nonsuit: and *Abbott* Ch. J. said, "I think that in this case it is quite clear, that the property in these goods had become actually vested in *Maxwell* before they were distrained for rent. The contract is for immediate delivery; and by the order for delivery, *Maxwell* was enabled to obtain immediate possession. The sellers, therefore, had done every act on their part to be done, and the delivery to *Maxwell* was complete. It is true that by the usage of *Liverpool*, the seller is also to pay the rent of the warehouse for two months after the sale; but that is a matter of express stipulation, and does not by any means compel the latter to indemnify the purchaser against accidents occurring in the meanwhile. Suppose a loss by fire within the two months; that would undoubtedly fall on *Maxwell*; and the circumstance of the goods being distrained for rent due to the landlord of the premises, is also an accident to which the goods are liable, and which must fall on *Maxwell*, in whom they are vested at the time."

So, where goods lying at the docks are sold, and the seller delivers to the buyer the usual dock warrants and certificates, which are commonly handed over to the vendee upon such sales as a symbolical delivery; this is deemed sufficient to transfer and vest the property in the buyer, without any entry of such transfer being made in the books of the company. This was settled in the case of *Zwinger v. Samuda*, (*h*) which was an action brought to recover the value of 30 casks of coffee lying in the warehouses of the *West India Dock Company*. The plaintiff had purchased the coffee under the following circumstances: it had been purchased by *Roebuck*, with money advanced by the defendant; and for securing repayment, *Roebuck* had transferred it in the books of the *West India Dock Company*, into the name of *David Samuda*, in trust for the defendant by way of pledge. *Roebuck* afterwards, on the 13th *August*, agreed to sell the coffee to the plaintiffs, to be paid for in cash on the 17th *August*; and on the 16th of *August*, he requested the defendant to give up to him the dock warrants, or orders for the delivery of the coffee, which the defendant refused to do unless he were first

(*h*) 7 Taunt. 265.

paid his debt; whereupon *Roebuck* showed him 1000*l.*, out of which he said the defendant should be paid; but that, for the sake of acquiring credit at his bankers he wished to pay them this sum, and immediately to give the defendant a cheque upon them for 530*l.* the amount of the debt due to him. The defendant acquiesced, and took the cheque, and wrote at the foot of the delivery notes his signature to an order for the delivery of the above mentioned goods to ———, and gave them on the same day to *Roebuck*, who on that day received of the plaintiffs the price thereof, and delivered to them the delivery notes to be filled up by themselves, with their own or their agent's name, as the party to whom the goods were to be delivered. The cheque which the defendant had taken, *Roebuck* immediately instructed his bankers not to pay; and upon its dishonour, the defendant, before the delivery notes had been presented at the *West India Docks*, gave notice there, and prevented the delivery of the goods to the plaintiffs, who on the 19th *August* demanded the goods. The plaintiffs insisted that the property in the coffee was vested in them by the indorsement of the delivery note; for that such was the custom of this trade, established ever since the *West India* docks had been formed; and they proved, that the practice prevails of transferring these documents from hand to hand, by indorsement, as a symbolical delivery of the property, to which the officers of the *West India* docks pay attention and give effect; for that, upon the request of any holder of such delivery notes, the company will substitute for them new notes, deliverable to the holders of the old notes. It was also proved, that persons engaged in the trade, treat and consider these notes as passing the property by indorsement. The jury having found a verdict for the plaintiffs, the case came before the Court of Common Pleas, on a motion to set aside the verdict, and enter a nonsuit, which the Court refused to do. And *Dallas* Ch. J. observed, "It has been said, that it would be inconvenient if property may be transferred by these delivery notes. The best test of their convenience is the use of them, which has obtained ever since these docks have been erected. Two witnesses, very conversant with this trade, stated that there was a general practice prevalent, to receive these warrants in the market, and to pay for the goods therein specified, without going to the dock-house to examine whether any stop was put on them. Without saying that this is such a usage as to constitute a rule of law, there is, in the particular case, enough to shew that there is no foundation for the observation, that the practice will be productive of inconvenience. It is enough, therefore, to say, that the persons who hold these notes have given a valuable consideration for them, and that therefore, they are entitled to the property."

So, in the case of *Manton v. Moore*, (i) where an engineer contracted

(i) 7 T. R. 67.

with a canal company to build locks and bridges upon their canal; and for that purpose brought materials to the wharf of the company on the canal, after which, being in arrear to the company, he executed a bill of sale to them of the materials, and made a symbolical delivery of a halfpenny. The Court held, that the bill of sale was not fraudulent, but that the property was thereby transferred to the company; for as the goods were already on the premises, the only mode of giving possession of them was, by such a symbolical delivery as had actually taken place.

Goods purchased by an agent abroad, and put on board vessels belonging to the principal, vests the property in him; even though the agent sent bills of lading, indorsed in blank, to his agent in *England*, with instructions, that if the plaintiff did not accept his bills of exchange, the bills of lading should be endorsed over to the payees of the bills of exchange; which was accordingly done. It was, however, determined that these proceedings of the agent did not change the property in the goods. (*k*) So, where timber lying at a wharf or warehouse, is marked with the initial letter of the buyer, this is sufficient to vest the property absolutely in him. (*l*) But a symbolical delivery upon a contract for the sale of a thing not in existence at the time, passes no property. (*m*) And therefore, if an order be given for the building of a barge, the property in it, will not rest in the purchaser until it is finished, even though the purchaser may have paid the whole price in advance. (*n*)

2. OF THE VENDOR'S LIEN OR RIGHT TO RETAIN POSSESSION OF THE GOODS UNTIL PAID FOR.] — The term lien, in its strict and legal signification, means the exercise of a qualified right to retain the property of another until a claim is satisfied. Strictly speaking, therefore, it is a contradiction in terms, to say a man has a lien upon his own goods; for he, who has only a lien on goods, cannot sell them, he can only retain them till the original price is paid.* However, as the goods when sold, are partially vested in the buyer, this term, when used in such a qualified manner, may not improperly be applied to the present subject; and therefore where goods have been sold, and there has been a part payment of the price, the vendor has a lien or right to retain and keep possession of the goods, until the whole of the purchase money is paid. (*o*) But if a future day of payment be fixed by the contract, the seller thereby waves his lien, and the buyer has a right to take the goods immediately; and the seller in default of payment of the price at the appointed time, has a remedy by action against the buyer. (*p*) So, where the seller parts with the possession of

(*k*) *Ogle v. Atkinson*, 5 Taunt. 759. But see the case of *Woods v. Russell*, 5 Barn. & Ald. 942.

(*l*) 14 East Rep. 308. 312.

(*m*) 2 Barn. & Ald. 248.

(*n*) *Mucklow v. Mangler*, 1 Taunt. 318.

* Per *Buller* Just. 6 East, 27. in notis.

(*o*) Per *Laurence*, Just. 3 East. Rep.

102. But see *Dyer* 29. b. 6 East. 614.

(*p*) *Dyer* 30. a.

the goods, he loses his lien; and it will not be revived by the insolvency of the purchaser, who has not paid for the goods. (g) But where goods are sold to be paid for on delivery; and on the vendee neglecting to take away the goods, and pay the price, the vendor brings an action against the vendee for goods bargained and sold, and obtains a verdict; the vendor may still retain his lien on the goods until the amount is paid: and they cannot be taken in execution by the sheriff, in an action brought against the vendee, at the suit of one of his other creditors. (r) So, the insolvency or bankruptcy of the buyer, is a valid defence to an action brought by him or his assignees, for the nondelivery of goods which have been bargained and sold. (s)

3. OF THE VENDOR'S RIGHT TO STOP GOODS SOLD, *IN TRANSITU*, UPON THE EVENT OF THE INSOLVENCY OF THE BUYER.] — It is reasonable and just, that upon every sale of goods the vendor should either receive the stipulated price, before he has parted with the possession of them, or that he should have power to take and retain the goods when sold upon credit, or so much of them as are not absolutely delivered over to the vendee in the event of his insolvency. And our law, which is founded on reason and justice, has provided, that upon every contract of sale, the vendor in the event of the insolvency of the vendee, whilst the goods are in their *transit*, and before they have got into the actual possession of the latter, may stop the goods, and resume the possession of them, until he is paid the price for which they were agreed to be sold. (t) This right, however, when exercised, does not rescind the contract of sale; and therefore upon a tender of the price, and a readiness on the part of the vendee to perform the contract, the vendor is bound to deliver up the goods. (u) And so, on the other hand, if the vendor offers to deliver up the goods to the vendee, he may afterwards maintain an action against him for the price. (v)

The general rule of law upon this subject is very clearly laid down in the case of *Ellis v. Hunt*, (w) which was an action of trover; and the question came before the Court of King's Bench, upon a special case, which stated, that on the 31st Oct. 1788, *Moore* the bankrupt, ordered the goods in question from the plaintiffs, who were manufacturers at *Sheffield*; and on the 14th of *November* following, they were sent by *Royle's* waggon, directed to the bankrupt in *London*; the waggon being overloaded, the cask was taken out at *Stamford*, in its way to town, and put into the defendant *Hunt's* waggon, which brought it to the *Castle and Falcon Inn* in *London* on the 22nd of *November* 1788.

(g) 3 Pr. Wms. 185.

(r) *Houlditch v. Desanges*, 2 Stark. 357.

(s) 5 Term Rep. 218. n.

(t) Vide 3 T. R. 464. and see 6 East Rep. 27. in notis.

(u) *Ibid.* 469.

(v) *Kymer v. Suwercropp*, 1 Campb.

109.

(w) 5 Term Rep. 464. see also *Abbott on Shipping*. 351. *Whittaker on Stoppage in transitu*. Long on Sales, ch. 8.

The plaintiffs drew a bill on the bankrupt for part of the value of the goods, which bill was never paid. The cask and files were, on their arrival in town, immediately attached by Messrs. *Fenton and Company*, creditors of the bankrupt, by process of foreign attachment issued out of the Mayor's Court of *London*; the casks remained at the inn charged with such attachment, so far as the same could charge it. On the 15th of *November*, a docquet was struck against *Moore*; and on the 18th, a commission of bankrupt issued against him, on which he was declared a bankrupt, and the other defendants were chosen his assignees. On the 24th of *November* a provisional assignment was executed by the commissioners to *John Wells*, the messenger under the commission, who, on the same day, demanded the goods in question from the defendant *Hunt*, the carrier, and put his mark upon the cask, but did not take the goods away. On the 28th of *November*, the plaintiffs wrote a letter to the agent of *Royle's* waggon, directing him, in case the goods were not delivered, to keep them in his warehouse, as they had heard that *Moore* was become a bankrupt. On the 13th of *December*, the plaintiffs demanded the cask and files of *Mott*, the master of the *Castle and Falcon*, and offered to pay the carriage, and to indemnify him, which *Mott* refused; and upon the attachment being withdrawn, he delivered up the goods to the defendants, the assignees, of whom they have since been demanded; but they have refused to deliver them up. The Court determined, that the plaintiffs were not entitled to stop the goods; and therefore could not maintain the present action: and Lord *Kenyon* Ch. J. said, "The doctrine of stopping goods *in transitu* is bottomed on the case of *Snee v. Prescott*, (x) where Lord *Hardwicke* established a very wise rule, that the vendor might resume the possession of goods consigned to the vendee before delivery, in case of the bankruptcy of the vendee. On this all the other cases are founded. There have indeed been cases, where nice distinctions have been taken on the fact, whether the goods had or had not got into the possession of the vendee; but they all profess to go on the ground of the goods being *in transitu* when they were stopped. As to the necessity of the goods coming to the "corporal touch" of the bankrupt, that is merely a figurative expression, and has never been literally adhered to; for there may be an actual delivery of the goods without the bankrupt's seeing them; as, a delivery of the key of the vendor's warehouse to the purchaser. In order to decide this case, it is material to attend to the dates. On the 24th of *November* the provisional assignment was made to *Wells*, who on the same day demanded the goods in question of the defendant *Hunt*, and put his mark on the cask. Now it is said, that this should have been done by the bankrupt himself: but by

(x) 1 Atk. Rep. 248.

the assignment he was stripped of all his property, which was then vested in the provisional assignee; therefore, if a corporal touch were necessary, to defeat the right of the vendors, it took place here. It is true, that the provisional assignee did not alter the situation of the goods; but they were then arrived at the end of their destined journey, and deposited in a place where they would have remained till the bankrupt could have carried them to a warehouse of his own. All this happened on the 24th of November; and it was not until the 28th of that month that the vendor wrote to countermand the delivery of the goods; but that was too late; for the goods were no longer *in transitu*; they were then in the possession of the party to whom they were consigned, or of those who represented him. In cases of this sort, we cannot but feel for the situation of the manufacturer, but it is such as they are necessarily subject to from their mode of dealing: however, the severity of the case cannot induce us to break through the rule of law." And *Buller Just.* said, "I am not disposed to disturb or to lessen the authority of any of the cases that have been decided on this subject; but none of them could justify the vendor in this case in taking back the goods. In the former cases the line has been precisely drawn; and they all turn on the question, whether or not there had been an actual delivery to the bankrupt. It is of the utmost importance to adhere to that line; for if we break through it, we shall endanger the authority of the cases that have been already decided, and shall fritter away the rule entirely. In one of the cases cited, Lord *Mansfield* took the distinction between an actual and a constructive delivery to the vendee. There may be cases where, as between the buyer and seller, if no bankruptcy or insolvency happen, the goods are considered in the possession of the buyer, the instant they go out of the possession of the vendor; as if A. order goods from B. to be sent by a particular carrier at his own risk, the delivery to the carrier is a delivery to the vendee to every other purpose; but still if he become a bankrupt, before the carrier actually deliver them to him, I should hold that the vendor might seize them; because that is only a constructive delivery to the vendee; but an actual delivery is necessary to divest the vendor's right of stopping the goods *in transitu*. It is clear, that bankruptcy itself does not put an end to the contract; and if not, the right of the vendor to seize goods *in transitu* is founded only on equitable principles. It is a right with which he is indulged on principles of justice, originally established in courts of equity, and since adopted in courts of law. But, in order to avail himself of it, he must stop the goods before they get into the actual possession of the vendee: but in this case there is the strongest evidence of the consignee's taking actual possession of the goods, by his assignee putting his mark on them. It was said by the plaintiff's counsel, that the carrier would have been liable in an action by the vendor;

but he would not have been liable in the character of carrier; for the goods had got to the end of their destined journey; but he would have been liable only as a warehouse-keeper; in respect of the recompence which he was to receive for warehouse-room. But the instant the provisional assignee put his mark on the goods, the warehouseman became the agent or servant to the bankrupt."

Upon a complete delivery of part of one entire cargo to the consignee, the *transitus* is ended, and the consignee cannot stop the remainder. (y) But where a quantity of iron had been sold and sent by a carrier, who had actually delivered part of them on the wharf of the vendee; at which place, however, the iron was to be weighed; but hearing of the insolvency of the latter, he discontinued a further delivery, and re-shipped that part so deposited on the wharf into his barges, and detained the whole for his freight: the Court held, that the delivery was not so complete as to take away the vendor's right of stoppage *in transitu*. Thus, in the case of *Crawshay v. Eades*, (z) which was an action of trover; and the facts were, that on the 26th January 1822, the plaintiffs loaded at *Breniford*, on board two barges belonging to the defendant, 348 bars of iron, and delivered the following ticket, "Shipped 348 bars of iron, weight 205. 0. 20. for Messrs. *Hornblower, Brierly-hill*, near *Stourbridge*, from *R. and W. Crawshay and Co.*" The iron was sent to *Hornblower* on sale. On the 8th February, the barges with the iron arrived at *Hornblower's* works, and on the 9th a part out of each of the barges was landed upon his wharf. The defendant then hearing that *Hornblower* was gone off, enquired of his confidential clerk, who informed him that it was all over with the *Brierly* works, and told him, that he the defendant had better take the iron on his own account; the defendant in consequence reshipped the part that had been landed, and conveyed the whole to his own premises. The practice had been to deliver to the carrier, when the iron was shipped a ticket specifying the quantity, and upon arrival at *Hornblower's* wharf to weigh it, and to give to the carrier a receipt for the quantity so weighed and delivered. Upon this evidence, a verdict was found for the plaintiff; but a motion was afterwards made for a new trial, founded upon an affidavit, stating that it had never been the usage to weigh the iron, or give a receipt for it at *Hornblower's* wharf; and the witness, who at the trial gave evidence to that effect, now swore that it was by mistake. The Court, however, refused the rule, and determined that the delivery of the iron had not been complete, and that the vendor's right to stop *in transitu* was not taken away. And *Bayley* Just. said, "There can be no doubt that wherever there is a complete delivery of part of one entire cargo to the consignee, the *transitus* is ended, and the consignor cannot stop the re-

(y) *Stubey v. Heyward*, 2 H. Blac. 504. (z) 1 Barn. & Cres. 181.
1 New Rep. 69.

mainder. But in this case there was no complete delivery of any part of the iron to *Hornblower*; the goods were in different barges, and a part of the iron was taken out of each barge, and landed upon *Hornblower's* wharf; but he had not taken possession of it, nor was it weighed; so that the amount of the freight due to *Eades* might be ascertained. Now, independently of any particular usage, a carrier has, by the common law, a right to insist that the goods shall be weighed, in order, first, that it may be ascertained for his own security, that he has delivered the precise quantity entrusted to him; and secondly, that the amount of the freight, if it depend upon the weight, may be ascertained. When part of the iron was landed upon the wharf, it might more properly be considered as in a course of delivery, than as actually delivered. By placing it upon the wharf, the carrier did not mean to assent to *Hornblower's* taking it away without paying the freight: besides a carrier has a lien on the entire cargo, for his whole freight; and until the amount is either tendered or paid, the special property which he has in his character of carrier does not pass out of him to the vendee, unless, indeed, he does some act to show that he assents to the vendee's taking possession of the property before the freight is paid. It is clear, upon the facts given in evidence at the trial, that the carrier never did assent to *Hornblower's* taking possession of the property; for he re-ships the part of the iron that was landed, as soon as he is informed that the freight is not likely to be paid. In order to divest the consignee's right to stop *in transitu*, there ought to be such a delivery to the consignee, as to divest the carrier's lien upon the whole cargo. I am of opinion, therefore, that the entire freight not having been tendered or paid, the delivery in this case was not complete as to any part; that the special property remained in the carrier, and that the consignor was not deprived of his right of stoppage *in transitu*."

If, however, in the course of the conveyance of goods from the vendor to the vendee, the latter be allowed to exercise any act of absolute ownership over them, this is sufficient to reduce the goods into his actual possession, and to put an end to the vendor's right to stop them. (a) So, the transit may also be put an end to, either by the goods arriving at the shop or warehouse of the vendee, or by being taken into his immediate personal possession; and in either case the right of the vendor to stop the goods *in transitu* is gone.

Payment of part of the price of goods by the consignee, does not take away the consignor's right to stop them *in transitu*. (b) So, where the

(a) *Wright v. Lawes*, 4 Esp. 82. *Mills v. Ball*, 2 Bos. & Pul. 457. Sed vid. *Holst v. Pownall*, 1 Esp. 240.; and *Abbott on Shipping* 362., where a distinction is taken between the carriage of goods by land and by sea, under a bill of lading;

and in the latter case it is said, that the consignor's right to stop *in transitu* continues till the termination of the voyage.

(b) *Hodgson v. Loy*, 7 Term Rep. 440.

vendee accepts bills of exchange for the price of the goods, and becomes bankrupt before the bills of exchange are paid, the consignor may stop the goods *in transitu*; for though the bills may be proved under the commission, that would only amount to a part-payment; and it will make no difference though the vendor may have indorsed the bills to a third person. (c) But in the case of *Davis v. Reynolds*, (d) where it appeared that the purchaser of goods after having given his acceptance for the price of them, and before the bill became due, and while the goods were *in transitu*, sold them for a valuable consideration, but without indorsing the bill of lading to the purchaser; Lord *Ellenborough* ruled, that the purchaser had completed his title to the goods by accepting the bill of exchange, and that the sale by him defeated the seller's right to stop the goods *in transitu*.

In order to justify a right of stoppage of goods *in transitu*, it is necessary that the consignee should become bankrupt or be insolvent; for if goods are sent by order of the consignee, on his account and at his risk, and the consignee draws bills of exchange on him for the price, and indorses and transmits the bills of lading, the consignor cannot take possession of the goods at the place of destination, and insist upon immediate payment, as the condition of delivery; the consignee being willing to accept the bills, and not having failed in his circumstances. (e) Goods delivered by the vendor to a particular wharfinger or packer named by the vendee, to be forwarded to the latter, may be stopped *in transitu* before they get into his actual possession. (f) And notice by the vendor to a wharfinger, packer, or carrier, not to deliver the goods to the vendee, is sufficient, without making an actual seizure. (g) So, the right of a consignor to stop goods *in transitu* is not defeated by the goods being attached while in their transit, by process out of the Lord Mayor's Court, at the suit of a creditor of the consignee. (h)

So, in the case of *Buck v. Hatfield*, (i) where goods were sold free on board; and upon their shipment, the agent of the vendors tendered to the mate (the captain being absent) a receipt, by which the goods were acknowledged to be shipped on account of the vendors, which the mate kept, but refused to sign; and on the following day, signed bills of lading to the order of the vendees: it was determined, that the transit was not at an end, but that the vendors, on the insolvency of the vendees, were entitled to stop the goods: and in this case *Abbott Ch. J.* said, "If the delivery on board the vessel to the vendees had ever been completed, the *transitus* would have been at an end; but when it was made at first, it was accompanied by the demand of a receipt from the mate, who repre-

(c) *Reise v. Wray*, 3 East. 93.

(d) 4 Campb. 267.

(e) 3 East. Rep. 585.

(f) *Mills v. Ball*, 2 Bos. & Pul. 457.
Loeschman v. Williams, 4 Campb. 181.

(g) *Lett v. Cowley*, 7 Taunt. 169.

(h) *Smith v. Goss*, 1 Campb. 282. 2 Bos. & Pul. 457.

(i) 5 Barn & Ald. 652.

sented the captain. Now, it was important for the vendors to have that receipt, for so long as they retained possession of it, they were enabled to interpose a delay as to the delivery of the rum to the vendees, and retain a lien upon it. The captain ought not to have signed bills of lading until that receipt had been handed over to him by the vendees, after having been delivered to them by the vendors.

If the consignor consign goods to be sold on the joint account of himself and the consignee, the former may stop the goods *in transitu* on the insolvency of the consignee. (*k*) So, goods deposited at the King's warehouse on their arrival, on account of the duties, may be stopped by the consignor. (*l*)

When part of a large quantity of goods lying in bulk, are sold, and before a delivery can take place, it is necessary either to sort or weigh, or draw off the part so sold from the mass; the vendor's right to stop them continues until all those acts are done in order to put them in a state of complete delivery; notwithstanding the vendee may be vested with a delivery order, and although such order is lodged with the party who has the custody of the goods in bulk; and even where part of such goods may happen to have been actually delivered, still the remainder, if not weighed off, &c. may be stopped *in transitu*. (*m*) But where goods, lying at a wharf or warehouse, are sold, and are in a state fit for immediate delivery without requiring any thing to be done to them, and a delivery order is given, and lodged with the wharfinger or warehouseman; or where the vendee is charged with warehouse rent, or where a key of a warehouse or any other symbolical delivery is made of the goods, the absolute property is vested in the buyer, and the right of stoppage *in transitu* is gone. (*n*) So, the putting the vendee's mark upon goods lying at a wharf, or any other act showing an exercise of absolute and entire dominion over them, puts an end to the right of stoppage *in transitu*. (*o*) So, where the vendee has no warehouse of his own, but deposits the goods at the warehouse of his packer, the transit of such goods is at an end upon delivery of them to the packer. (*p*) So, where goods are delivered to a vendee at a wharf, who afterwards ships them, the right of stoppage *in transitu* is gone. (*q*) And if goods have so far got to the end of their journey, that they wait only for new orders from the purchaser to put them in motion again, the transit is at an end, and the vendor cannot stop them *in transitu*. (*r*)

So, the transfer of a dock warrant to the vendee operates construct-

(*k*) *Newsom v. Thornton*, 6 East. Rep. 17.

(*l*) *Northey v. Field*, 2 Esp. Rep. 613.

(*m*) 13 East. Rep. 525. 2 M. & S. 397. 1 Marsh. 252. 4 Campb. 237. 5 Taunt. 617. Et vide ante 136. As to what shall constitute a complete delivery, so as to vest the absolute property in the buyer.

(*n*) 3 Term Rep. 468. 1 Campb. 452. 2 Campb. 243. 1 New Rep. 69. 7 Taunt. 278. And see *Holt's Ni. Pri. Cas.* 18. 22. in notis. Et ante, 136.

(*o*) *Stoveld v. Hughes*, 14 East. 308.

(*p*) *Scott v. Pettit*, 3 Bos. & Pul. 469.

(*q*) *Noble v. Adams*, 7 Taunt. 59.

(*r*) 5 East. 175.

ively as a transfer of the property in the goods sold, so as to defeat the vendor's right of stoppage *in transitu*. (s) A delivery of possession to the vendee, or his representative, of part of the goods sold upon an entire contract, or any assent to a sub-sale, will be considered as a sufficient delivery to determine the *transitus* as to the whole. (t)

With respect to the right of stoppage of goods *in transitu*, where the property passes by bill of lading, the general rule of law is, that the consignee of goods by the assignment of a bill of lading, or other disposal thereof to a third person for a valuable consideration, may confer an absolute right and property upon such assignee, indefeasible by any claim on the part of the consignor; subject, however, to this restriction, that the assignment should be made *bond fide* to all parties, and without notice to the assignee that the vendee is insolvent. (u) But if there be no consideration, or there appear any fraud in the assignment on the part of the assignee, with a view not only of depriving the vendor of his right to stop the goods *in transitu*, but also of the price of the goods, the assignment will be invalid as against the vendor. (v) So, if the assignee, though for valuable consideration, know of the vendee's insolvency at the time of his accepting the assignment, he can gain no legal title to the goods thereby, as against the vendor. (w)

12. OF THE SALE AND TRANSFER OF GOODS BY DELIVERY OR INDORSEMENT OF A BILL OF LADING.

In mercantile transactions between merchants residing in different countries, or at ports and places remote from each other in this country, when a cargo of goods is shipped for the vendee upon a contract of sale, or where a consignment is made to a factor or correspondent for sale, the vendor or consignor usually causes a bill of lading to be made out in three parts, each of which is signed by the captain of the vessel in which the goods are shipped; and the consignor generally forwards one of them to the vendee or consignee, and another is sent on board the ship with the goods, and the third is kept by the consignor himself: and it is said (x), that the master should take care to have another part for his own use. Now, this bill of lading is a contract by the master, on behalf of himself and his owners, to convey the goods to the place of destination, and to make a true and right delivery thereof either to the consignee or his assigns, or to the consignor or his assigns. Sometimes no person is named as consignee, but the terms of the in-

(s) *Zwinger v. Samuda*, ante, 150 in notis, 2 East, 63. *S. C. Vertue v. Lucas v. Dorrein*, 7 Taunt. 278. *Spears v. Jewell*, 4 Campb. 31.

Travers, 4 Campb. 251.

(t) *Hanson v. Meyer*, 6 East. 614.

Stubey v. Heyward, 2 H. Bl. 504.

(u) *Lickbanow v. Mason*, 6 East, 28.

(v) *Waring v. Cor*, 1 Campb. 369.

Salomons v. Nissen, 2 Term Rep. 681.

(w) 4 Campb. 31.

(x) *Abbott* on Shipping, ch. ii. § 3.

strument are, "To be delivered, &c. unto order, or assigns," which words are generally understood to import an engagement on the part of the master, to deliver the goods to the person to whom the shipper or consignor shall order the delivery, or to the assignee of such person. (z) And it is observed (a), that bills of lading sometimes, especially in time of war, contain a false account and risk, and do seldom, if ever, bear upon the face of them any indication of the purpose of the indorsement. In order to designate the kind of goods shipped, a corresponding mark or description, with those put upon the casks, chests, or packages on board, is inserted in the bills of lading.

It was at one time doubted whether the indorsement of a bill of lading in blank, and the delivery of it to the consignee, transferred the legal property of the goods to him, and to an indorsee; but that point is now settled, that such a transfer does vest the property in the consignee, or *bonâ fide* indorsee for a valuable consideration. And the law on this subject was most ably and clearly stated in a very elaborate and learned opinion delivered by *Buller* Just. in the House of Lords, in the case of *Lickbarrow v. Mason* (b), where his lordship, in taking a review of the previous cases, says, "that though Lord *Mansfield* at one time thought that there was a distinction between bills of lading indorsed in blank and otherwise, yet he afterwards abandoned that ground. And in *Salomons v. Nissen*, (2 Term Rep. 674.) the bill of lading was to order or assigns, and the indorsement in blank; but the court held it to be clear, that the property passed. He who delivers a bill of lading indorsed in blank to another, not only puts it in the power of the person to whom it is delivered, but gives him authority to fill it up as he pleases; and it has the same effect as if it were filled up with an order to deliver to him." And upon the question, whether at law, the property of goods at sea passes by the indorsement of a bill of lading, his lordship said, "Every authority which can be adduced from the earliest period of time down to the present hour, agree that, at law, the property does pass as absolutely and as effectually as if the goods had been actually delivered into the hands of the consignee. In 1690, it was so decided in the case of *Wiseman v. Vandeputt*, 2 Vern. 203. In 1697, the Court determined again in *Evans v. Marlett*, that the property passes by the bill of lading. That case is reported in 1 Ld. Raym. 271., and in 12 Mod. 156., and both books agree in the point decided. Ld. Raymond states it to be, that if goods by a bill of lading are consigned to A.,

(z) *Abbott* on Shipping, 218.

(a) Per Lord *Loughborough*, 1 H. Bl. 361.

(b) 6 East Rep. 20. 1 H. Bl. 357. 2 Term Rep. 63. In this case the judges differed in opinion; and no final judgment upon the question was given. But

the law, as delivered by Mr. Just. *Buller*, and several other learned judges in this case, has been confirmed by many subsequent cases; particularly *Cuning v. Brown*, 9 East, 506., and *Newson v. Thornton*, 6 East Rep. 17.

A. is the owner, and must bring the action; but if the bill be special, to be delivered to *A.*, to the use of *B.*, *B.* ought to bring the action; but if the bill be general to *A.*, and the invoice only shews that they are on account of *B.*, (which I take to be the present case) *A.* ought always to bring the action; for the property is in him, and *B.* has only a trust. And *Holt* Ch. J., says, the consignee of a bill has such a property, as that he may assign it over: and *Shower* said, it had been so adjudged in the Exchequer. In 12 Mod. it is said, that the Court held that the invoice signified nothing; but that the consignment in a bill of lading gives the property, except where it is for the account of another, that is, where on the face of the bill it imports to be for another. In *Wright v. Campbell*, in 1767, (4 Burr. 2046.) Lord *Mansfield* said, "If the goods are *bonâ fide* sold by the factor at sea, (as they may be where no other delivery can be given,) it will be good, notwithstanding the stat. 21 Jac. 1. The vendee shall hold them by virtue of the bill of sale, though no actual possession be delivered; and the owner can never dispute with the vendee, because the goods were sold *bonâ fide*, and by the owner's own authority." His Lordship added, (though that is not stated in the printed report) that the doctrine in Lord *Raymond* was right, that the property of goods at sea was transferable. In *Fearon v. Bowers*, in 1753, Lord Ch. J. *Lee* held, that a bill of lading transferred the property, and a right to assign that property by indorsement; but that the captain was discharged by a delivery under either bill. In *Snee v. Prescott*, in 1743, (1 Atk. 245.), Lord *Hardwicke* says, "Where a factor, by the order of his principal buys goods with his own money, and makes the bill of lading absolutely in the principal's name, to have the goods delivered to the principal, in such case the factor cannot countermand the bill of lading, but it passes the property of the goods fully and irrevocably in the principal." Then he distinguishes the case of blank indorsement, in which he was clearly wrong. He admits too, that if upon a bill of lading between merchants residing in different countries, the goods be shipped and consigned to the principal expressly in the body of the bill of lading, that vests the property in the consignee. In *Caldwell v. Ball*, in 1786, (1 Term Rep. 205.) the Court held, that the indorsement of the bill of lading was an immediate transfer of the legal interest in the cargo. In *Hibbert v. Carter*, in 1787, (1 Term Rep. 745.) the Court held again, that the indorsement and delivery of the bill of lading to a creditor, *primâ facie*, conveyed the whole property in the goods from the time of its delivery. The case of *Godfrey v. Furzo*, (3 P. Wms. 185.) was quoted on behalf of the defendant. A merchant at *Bilboa* sent goods from thence to *B.*, a merchant in *London*, for the use of *B.*, and drew bills on *B.* for the money. The goods arrived in *London*, which *B.* received, but did not pay the money, and died insolvent. The merchant beyond sea brought his bill against

against the executors of the merchant in *London*, praying that the goods might be accounted for to him, and insisting that he had a lien on them till paid. Lord Chancellor says, "When a merchant beyond sea consigns goods to a merchant in *London*, on account of the latter, and draws bills on him for such goods, though the money be not paid, yet the property of the goods vests in the merchant in *London*, who is credited for them, and consequently they are liable to his debts; but where a merchant beyond sea consigns goods to a factor in *London*, who receives them, the factor in this case being only a servant or agent for the merchant beyond sea, can have no property in such goods, neither will they be affected by his bankruptcy." And in another part of the learned Judge's argument, he further observes, "that the great advantage which this country possesses over most, if not all other parts of the known world, in point of foreign trade, consists in the extent of credit given on exports, and the ready advances made on imports; but amidst all these indulgences, the wise merchant is not unmindful of his true interest, and the security of his capital. I will beg leave to state in as few words as possible, what is a very frequent occurrence in the city of *London*. A cargo of goods of the value of 2000*l.* is consigned to a merchant in *London*, and the moment they are shipped, the merchant abroad draws upon his correspondent here to the value of that cargo, and by the first post or ship he sends him advice, and incloses the bill of lading. -The bills in most cases arrive before the cargo, and then the merchant in *London* must resolve what part he will take; if he accepts the bills he becomes absolutely and unconditionally liable; if he refuse them, he disgraces his correspondent, and loses his custom directly; yet to engage for 2000*l.* without any security from the drawer, is a bold measure, The goods may be lost at sea, and then the merchant here is left to recover his money against the drawer, as and when he may. The question then with the merchant is, how can I secure myself at all events? the answer is, I will insure, and then if the goods come safe I shall be repaid out of them, or if they be lost, I shall be repaid by the underwriters on the policy; but this cannot be done unless the property vest in him by the bill of lading, for otherwise his policy will be void for want of interest, and an insurance in the name of the foreign merchant would not answer the purpose. This is the case of the merchant who is wealthy, and has the 2000*l.* in his banker's hands, which he can part with, and not find any inconvenience in so doing. But there is another case to be considered, *viz.* suppose the merchant here has not got the 2000*l.*, and cannot raise it before he has sold the goods; the same considerations arise in his mind as in the former case, with this additional circumstance, that the money must be procured before the bills become due, then the question is how can that be done? If he have the property in the goods, he can go to market with the bill of

lading and the policy, as was done in *Snee v. Prescott*, and upon that idea he has hitherto had no difficulty in doing so; but if he have not the property, nobody will buy of him, and then his trade is undone. But there is still a third case to be considered, for even the wary and opulent merchant often wishes to sell his goods whilst they are at sea: I will put the case by way of example, that barilla is shipped for a merchant here at a time when there has been a dearth of that commodity, and it produces a profit of 25*l.* per cent., whereas upon an average it does not produce above 12*l.*; the merchant has advices that there is a great quantity of that article in Spain intended for the British market, and when that arrives the market will be glutted, and the commodity much reduced in value; he wishes, therefore, to sell it immediately, whilst it is at sea, and before it arrives, and the profit which he gets by that is fair and honourable; but he cannot do it if he have not the property by the bill of lading. Besides, a quick circulation is the life and soul of trade, and if the merchant cannot sell with safety to the buyer, that must necessarily be retarded."

So, in *Newsom v. Thornton*, (c) Lord Ellenborough Ch. J. in delivering the judgment of the Court of King's Bench upon the same subject, says, "A bill of lading, indeed, shall pass the property upon a *bonâ fide* indorsement and delivery, where it is intended so to operate, in the same manner as a direct delivery of the goods themselves would do, if so intended, but it cannot operate further. If a factor is in possession of goods, and sells them *bonâ fide*, the property passes by the delivery; but not where he means only to pledge them, because it is beyond the scope of a factor's authority to pledge the goods of his principal. The symbol then shall not have a greater operation to enable him to defraud his principal, than the actual possession of that which it represents. The principal who trusts his factor with the power to sell absolutely, shall so far be bound by his act; but the defendants shall not extend the factor's act beyond what was intended at the time. I consider the indorsement of a bill of lading, apart from all fraud, as giving the indorsee an irrevocable, uncountermandable right to receive the goods, that is, where it is meant to be dealt with as an assignment of the property in the goods, but not where it is only meant as a deposit by one who had no authority to do so. And *Lawrence Just.* said, "In the case of *Lickbarrow v. Mason*, some of the Judges did indeed liken a bill of lading to a bill of exchange, and consider that the indorsement of one did convey the property in the goods in the same manner as the indorsement of the other conveyed the sum for which it was drawn. But when the case was before the Exchequer chamber, there was much argument to shew, that in itself the indorsement of a bill of lading was no transfer

(c) 6 East. Rep. 41.

of the property, though it might operate as such, in the same manner as other instruments may be evidence of the transfer of property; as, if goods be sold by a merchant abroad to his correspondent here, and the bill of lading be sent to him indorsed, to deliver the goods to the vendee or his order; there the transfer of the goods may be evidenced by such indorsement, and if the vendee part with the property in the goods, while they are yet *in transitu*, and before his property in them is devested by the vendor's stopping them *in transitu*, and which assignment of the vendee's property may be evidenced in like manner by his indorsement to another, then, according to *Lickbarrow v. Mason*, the original vendor's right to stop them *in transitu* would be devested. Therefore, all that the case seems to have decided, is, that where the property in the goods passed to a vendee, subject only to be devested by the vendor's right to stop them while *in transitu*; such right must be exercised, if at all, before the vendee has parted with the property to another for a valuable consideration, and *bonâ fide*, and by indorsement of the bill of lading giving him a right to recover them."

Where there are several bills of lading, the person who first gets one of them by a legal title from the owner or shipper has a right to the consignment. (d) So, where a bill of lading has been indorsed *bonâ fide* as a security for a debt due to the indorsee from the consignee, the property in the goods mentioned in the bill of lading passes to the indorsee, even though it should appear that, at the time of the indorsement, he knew the consignee had not paid for them. (e) A bill of lading, however, if given before the goods are shipped, is deemed fraudulent; and the indorsement of such a bill will not legally pass the property in the goods even to a *bonâ fide* indorsee. (f)

The property in goods for which the master of a ship has given bills of lading, may be transferred by delivery, without indorsing the bill of lading; and such transfer will be good against all the world, except a *bonâ fide* indorsee for a valuable consideration. (g) But no property passes even by indorsement without a valuable consideration. (h)

We have before seen, that where an agent had purchased goods at *Riga* for his principal in *England*, and such goods were shipped on board the principal's own vessel as his goods; though the agent sent bills of lading, indorsed in blank, to his correspondent in *England*, with instructions that if his principal did not accept his bills of exchange, the bills of lading should be indorsed over to the payees of the bills of exchange, which was accordingly done; yet it was held, that the shipment of the goods passed the property absolutely in the vendee, it being his own ship, and rendered the indorsement of the bill of lading wholly inoperative. (i)

(d) *Caldwell v. Ball*, 1 Term Rep. 205.

(g) *Nathan v. Giles*, 5 Taunt. 558.

(e) *Cuming v. Brown*, 9 East Rep. 506.

(h) *Waring v. Cox*, 1 Campb. 369.

1 Campb. 104.

(i) *Ante*, 152.

(f) *Osey v. Gardner. Holt, Ni. Pri. Cas.* 405.

So, where the consignor of goods advised the consignee by letter, that he had chartered a certain ship on his account, and inclosed an invoice of the goods laden on board, which were then expressed to be for account and risk of the consignee, and also a bill of lading in the usual form, expressing the delivery to be made to order or assigns, he or they paying freight for the said goods according to charter-party; and the letter of advice also informed the consignee, that the consignor had drawn bills on him at three months for the value of the cargo: it was determined by the Court of King's Bench, that the invoice and the bill of lading sent to the consignee, and the delivery of the goods to the captain, vested the goods in the consignee, subject only to be devested by the consignor's right to stop the goods *in transitu* in case of the insolvency of the consignee. (i)

13. OF THE SALE OF GOODS, &c. IN FAIRS AND MARKETS OVERT.

On this subject the general rule of law is, that all sales and contracts for any thing vendible in fairs or markets *overt* (i. e. open markets), and for which a valuable consideration is *bonâ fide* given by the vendee, is not only good as between the contracting parties, and transfers a complete property in the article sold, but is also binding against all persons, except the king, whether infants, femmes covert, idiots or lunatics, persons beyond sea, or in prison, and whether they are possessed in their own right, or as executors or administrators; and whether any toll be paid to the owner of the market or not, and however improperly the vendor may have possessed himself of the goods. (k) And Mr. Just. *Blackstone* well observes, "That if upon sales of this description a *bonâ fide* purchaser was not to be made secure of his purchase, all commerce between man and man must soon be at an end." Fairs and markets *overt* are generally held on special days provided for particular towns by charter or prescription; but in *London* every day, except *Sunday*, is market-day. (l) The market-place, or spot of ground set apart by custom for the sale of particular goods, is also in the country the only market *overt*; (m) but in *London* every shop in which goods are exposed publicly to sale, is market *overt* for such things only as the owner professes to trade in. (n) But a sale of goods in a shop in the *Strand*, or elsewhere out of *London*, has been said not to alter the property. (o) But Lord *Hardwicke* appears to have considered, that where the transaction is perfectly fair on the part of the vendee, though the dealing is out of the precincts of *London*, great allowances ought to be made in analogy to the above-mentioned customs; and therefore, that the property of goods may be

(i) *Walley v. Montgomery*, 3 East Rep. 585.

(k) 2 Inst. 713. 220. Com. Dig. tit. Market. E. Bac. Abr. tit. Fairs and Markets. E

(l) Cro. Jac. 68.

(m) Godb. 131.

(n) 5 Rep. 83. 12 Mod. 521.

(o) Anon. 12 Mod. 521.

changed and effectually transferred to the buyer by a *bonâ fide* sale in a shop out of *London*, whether the shopkeeper is the vendor or vendee, if the goods are of the kind in which he trades. (p) And the same privilege may by custom be extended to a shop in *Bristol*, or elsewhere. (q) But a wharf in *London* is not within the custom, and is not a market *overt* for articles brought there: and therefore where goods were *bonâ fide* purchased at a public wharf, but the true owner afterwards claimed them, and brought trover against the vendee, it was held, (r) that he was entitled to recover, because the place of sale was not a market *overt*, and consequently no property passed. And so, in the commentaries upon the laws of *England*, (s) it is said, that "if my goods are stolen from me, and sold out of market-*overt*, my property is not altered, and I may take them wherever I find them." So, where an agent pawns the goods of his principal, the latter may maintain trover against the pawnbroker, without either tendering the duplicate according to the stat. 39 & 40 Geo. 3. c. 99. s. 5., or the amount and interest for which the goods are pledged. (t) And it is expressly provided by statute 1 Jac. 1. c. 21., that the sale of any goods wrongfully taken to any pawnbroker in *London*, or within two miles thereof, shall not alter the property; for this being usually a clandestine trade, is therefore made an exception to the general rule. And even in markets *overt*, if the goods be the property of the king, such sale (though regular in all other respects,) will in no case bind him; although it binds infants, feme covert, idiots or lunatics, and men beyond sea or in prison; or if the goods be stolen from a common person, and then taken by the king's officer from the felon, and sold in open market, still if the owner has used diligence in prosecuting the thief to conviction, he loses not his property in the goods. So likewise, if the buyer knoweth the property not to be in the seller; or there be any other fraud in the transaction; if he knoweth the seller to be an infant or feme covert, not usually trading for herself; if the sale be not originally and wholly made in the fair or market, or not at the usual hours; the owner's property is not bound thereby. (u) If a man buys his own goods in a fair or market, the contract of sale shall not bind him so that he shall render the price, unless the property had been previously altered by a former sale. (v) And notwithstanding any number of intervening sales, if the original vendor, who sold without having the property, comes again into possession of the goods, the original owner may take them, when found in his hands who was guilty of the first breach of justice. (w)

(p) *Harris v. Shaw*, Cas. Temp. Hardw. 349.

(q) But see *Moor*, 625. Com. Dig. tit. Market. E.

(r) *Wilkinson v. King*, 2 Campb. 356. Moore, 625.

(s) 2 Bl. Com. 449. Bacon's Use of the Law. 158.

(t) *Peel v. Baxter*, 1 Stark. 472.

(u) 2 Inst. 713, 714.

(v) Perk. s. 93.

(w) 2 Inst. 713.

By which wise regulations, the common law has secured the right of the proprietor in personal chattels from being divested, so far as was consistent with that other necessary policy, that purchasers, *bonâ fide*, in a fair, open, and regular manner, should not be afterwards put to difficulties by reason of the previous knavery of the seller.

But there is one species of personal chattels, in which the property is not easily altered by sale, without the express consent of the owner, and those are horses. (x) For a purchaser gains no property in a horse that has been stolen, unless it be bought in a fair or market overt, according to the directions of the statute 2 P. & M. c. 7. and 31 Eliz. c. 12, by which it is enacted, "that the horse shall be openly exposed, in the time of such fair or market, for one whole hour together, between 10 in the morning and sun-set, in the public place used for such sales, and not in any private yard or stable; and afterwards brought by both the vendor and vendee to the book-keeper of such fair or market; that toll be paid, if any be due; and if not one penny to the book-keeper, who shall enter down the price, colour, and marks of the horse, with the names, additions, and abode of the vendee and vendor; the latter being properly attested. Nor shall such sale take away the property of the owner, if within six months after the horse is stolen, he puts in his claim before some magistrate where the horse shall be found; and within 40 days more, prove such horse his property by the oath of two witnesses, and tenders to the person in possession such price as he *bonâ fide* paid for him in market overt; and in case any one of the points before mentioned be not observed, such sale is utterly void; and the owner shall not lose his property, but at any distance of time may seize his horse, or bring an action for him." (y) It was once decided, that the vendor entering a wrong name in the book of the market, would not invalidate the sale of a horse in market overt within this statute; (z) but that decision has been since overruled; and it seems now to be settled, that the property would not, under such circumstances, be altered. (a)

14. OF FRAUD AND DECEIT IN THE SALE OF GOODS; AND OF A DELIVERY OBTAINED UNDER FALSE PRETENCES: ALSO OF THE VENDOR'S RIGHT TO FOLLOW AND SEIZE THEM.

All contracts which are infected with fraud, are void both at law and in equity; for the basis of all dealings ought to be good faith. (b) And therefore where an agent of the vendor of a picture, knowing that the vendor labours under a delusion with respect to the picture, which ma-

(x) 2 Inst. 719.

(y) 2 Blac. Com. 450.

(z) *Wilkes v. Morefoots*, Cro. Eliz. 86.

(a) *Gibbs's case*, Owen 27. and 1 Leon. 158.

(b) Vid. Ante, 58.

terially influences his judgment, permits him to make the purchase without removing that delusion, the sale is void. So, although a ship be sold under these terms, viz., "to be taken with all faults," the vendor cannot avail himself of that stipulation, if he knew of any secret defects in her, and used means to prevent the purchaser from discovering them; or made a fraudulent representation of her condition at the time of the sale. But where *A.* sells to *B.* a bowsprit, which at the time of sale appears to be perfectly sound, but which, after being used for some time, turns out to be rotten; in the absence of fraud, *A.* is entitled to recover from *B.* what the bowsprit was apparently worth at the time of delivery. (c)

If a trader is induced to supply goods to a minor upon a fraudulent representation by his father, that he is about to relinquish his business in favour of his son, the father is liable, he having interfered with the proceeds of the goods. Thus, in the case of *Biddle v. Levy*, (d) which was an action of *assumpsit* for goods sold and delivered brought by the plaintiffs, who were manufacturers of glass at *Birmingham* against the defendant, a trader in *London*, for goods sold and delivered. And it appeared at the trial, that the plaintiffs had dealt with the defendant for some time previous to the period when the defendant informed the plaintiffs that he was about to retire from business, and that his son *Samuel Levy* would succeed him; he added that he should keep a watchful eye over him, and afterwards introduced him personally to the plaintiffs. Upon this representation, the plaintiffs supplied the son *Samuel Levy* with goods to the amount of 800*l.* The plaintiffs contended, that though the credit was given to the son, yet, that under the circumstances the father was liable on the ground that his conduct was fraudulent; the son at the time the goods were supplied being a minor about the age of 17; and that the representation which the father made was false, and intended for the purpose of evading all responsibility. *Gibbs* Ch. J. in summing up the case to the jury, informed them, "That if the father had falsely represented to the plaintiffs, that he was about to recede from business and place his son in his shoes, in order that the plaintiffs might have no one to resort to, who was responsible, he was liable in the present action, whether in fact he had a secret interest conjointly with the son, or the son, contrary to the defendant's representation, had no interest whatsoever in the profits. On the first supposition, the defendant would be liable as a co-partner with his son, since he had not pleaded in abatement; on the second, he would be liable wholly as principal; having taken into his own hands that fund out of which the creditors, who trusted the son, might naturally expect to be paid." His lordship, in conclusion, informed the jury, "that the whole case turned upon the representation made by the defendant; that if they were of

(c) Vide Ante, 121.

(d) 1 Stark. 20.

opinion that the representation was false and fraudulent, they ought to find for the plaintiffs; if, on the contrary, they believed that it was made *bonâ fide*, they would find for the defendant." The jury found a verdict for the plaintiffs.

So, where a man had fraudulently induced a trader to sell goods to a third person, with a view of obtaining to himself the proceeds upon a resale, he was held liable to the trader for the value of the goods. Thus, in the case of *Abbotts v. Barry*, (d) which was an action for goods sold and delivered, and for money had and received. The following case in substance was proved at the trial. *Phillips* being indebted to the defendant, he, for the purpose of discharging the debt, procured wines from the plaintiffs by a string of contrivances, which amounted to a gross fraud; paying the plaintiffs only half the price of the wines, and giving a bill of exchange, which was of no value, for the residue. In these contrivances, the defendant was prime mover and participator, and furnished *Phillips* with the money to pay in part; the wines were then under defendant's direction and brokerage, and sold in *Phillips's* name to *Bunyan*, who accepted a bill drawn by *Phillips* for the amount, which *Phillips* immediately indorsed to the defendant. The jury found a verdict for the plaintiffs, on the ground that a gross fraud had been practised on them by the defendant: but the learned Judge gave leave to the defendant to move to set aside the verdict, and enter a nonsuit. A motion to this effect was accordingly made: the Court, however, refused the rule, and were clearly of opinion that the verdict was right. And *Dallas Ch. J.* said, "I think that this rule ought to be discharged; and upon this plain ground, that the jury have found a fraud in the defendant, committed by him through the medium of *Phillips*. Nor can I distinguish between *Phillips* and the defendant in the prosecution of this fraudulent transaction, for *Phillips* stands in the light of agent to the defendant throughout the whole contrivance. But it is not necessary to go that length; nor do I wish to come to any decision uncalled for by the case before the Court. I confine myself strictly to this. Here was a sale of wines, the property of the plaintiffs, brought about by fraud and collusion, in which the defendant, who was to reap the benefit of such sale, was prime mover. Now it is admitted, that a sale effected by fraud works no change of property; the property then in this case remained in the original owner, and therefore I hold the profits of the sale in the hands of the defendant, to be so much money had and received by him, to the use of the plaintiffs, who were the original proprietors. On this ground I am of opinion, that this application must be dismissed."

(d) 2 Brod. & Bing. 569. 5 Mo. 98.
and see also *Hill v. Perrott*, 3. Taunt.

Rep. 274. and *Thompson v. Bond*,
1 Campb. 4.

So in the case of *Jackson v. Duchaire*, (e) where an agreement was made between the plaintiff and defendant to take certain goods at a valuation ; but the defendant not being able to raise the money, she got a friend of the name of *Welch* to purchase them for her, and *Welch* agreed with the plaintiff for the same at the price of 70*l.* It appeared, however, in evidence at the trial, that there was a private agreement between the plaintiff and defendant unknown to *Welch*, that the defendant should pay the further sum of 30*l.*, over and above the 70*l.* to be paid by *Welch* ; and had in pursuance thereof given to the plaintiff two promissory notes of 15*l.* each ; and on one of which this action was brought ; and the plaintiff called witnesses to prove that the goods were worth more than 70*l.*, independently of the convenience to the defendant of purchasing them on the spot. But Lord *Kenyon* Ch. J., before whom the action was tried, was clearly of opinion that the plaintiff was not entitled to recover, upon the ground that the private agreement between these parties was a fraud upon *Welch*, who had paid this money in advancement of the defendant in confidence that the sum paid by him was the whole consideration. The jury, however, found a verdict for the plaintiff. But a rule for setting aside the verdict having been obtained, the Court determined, that the verdict was wrong, and that no action would lie.

So, where a buyer of goods fraudulently gives a bill of exchange in satisfaction and by way of barter for goods, knowing at the time that it is an unavailable security and worth nothing, he is answerable for damages in an action of trover or deceit ; but not in assumpsit for goods sold and delivered. Thus, in the case of *Read v. Hutchinson* (f), which was an action of assumpsit for goods sold and delivered upon the following sale-note, viz. "Sold for account of Mr. *James Read* — To *John Hutchinson*, Seven pipes *Guernsey* red-wine, *Ex Prince Regent*, at 47*l.* per pipe, as they lie in the *London Dock*, to be paid for by Mr. *Edward's* bill on Mr. *P. Young* of 328*l.* 12*s.* due in *December* next, without recourse on the buyer in case of its not being paid." The wines were immediately transferred in the *London Docks* to the defendant, and he gave the bill upon *Young* in payment. The plaintiff's case was, that this bill was dishonored when due, and that the defendant at the time of the sale perfectly well knew it was worth nothing, and had deceitfully represented it as an available security ; and it was contended that the defendant was still liable to pay for the goods. But Lord *Ellenborough* Ch. J. said, " I am of opinion this action cannot be maintained. If there be any contract between these parties, it is that evidenced by the broker's note ; and according to that, the wines were not to be paid in money, but were to be bartered against a bill of exchange, and it was

(e) 5 Term Rep. 551.

(f) 3 Campb. 352.

expressly stipulated that the buyer was not to be liable in case the bill should be dishonoured; therefore he never was indebted to the plaintiff for the price of the wines, and the law cannot imply a promise on his part to pay for them. If the contract is altogether rescinded, there is no sale. The defendant is not a purchaser of the goods, but a person who has tortiously got possession of them. If he knew, at the time, that the bill was worth nothing, I think he is answerable to the plaintiff to the amount of the value of the goods; but this is not the proper remedy. The plaintiff should have brought trover, or an action of deceit."

So, where goods are obtained from a trader by fraud, and under a color pretence of making a purchase, and the trader is thereby induced to make an actual delivery of goods to him; such delivery does not pass the property, but the trader may legally follow the goods and seize them: but in doing so, great caution should be taken in not committing personal violence, or other breach of the peace, or of being guilty of any excess of trespass. Thus, in the case of *Noble v. Adams*, (g) which was an action of trover for a quantity of *Madras* handkerchiefs. The plaintiff contended that he had purchased them from *Cross* and Co. The defendant was a wharfinger in *London*, into whose hands the goods had come, by the plaintiff's order, upon their arrival in *London* from *Glasgow*; and the defendant sought to retain the goods for the benefit of *Cross* and Co., by whom he was indemnified. And upon the trial, the defendant submitted two grounds of defence, first, that the vendors had a right to stop the goods *in transitu*, which they had exercised by forbidding the defendant to deliver them; and, secondly, that the property in the goods never had been changed; the goods having been obtained under such circumstances of fraud as vitiated the sale. It appeared in evidence, that the plaintiff, a trader in *London*, being the holder of a bill for 447*l.* 13*s.*, accepted by *Outhwaite* and Co., with whom he was in the habit of exchanging bills, and whom he knew to have become insolvent; and knowing himself also to be in embarrassed circumstances, wrote to *Malcolm*, a creditor in *Glasgow*, stating that *Outhwaite* and Co. could not pay their bills, and were not worth a farthing; and that it was necessary for him (the plaintiff) to go down into *Scotland* and purchase goods, by which means he could stand, and would help out one or two of his creditors: he accordingly went to *Glasgow*, and there purchased the goods in question of *Cross* and Co., for which he paid by *Outhwaite's* acceptance, and by another bill for 108*l.* 13*s.* 10*d.*, which *Malcolm* was prevailed on to draw on the plaintiff, in favour of *Cross* and Co., payable at *Prescott's* and Co. in *London*. He did not, however, assist either of his creditors; and it did not appear in evidence who was the person that delivered the goods at the wharf at *Leith*; but it clearly

appeared that they were shipped for *London* by the plaintiff himself, to whom the defendant's employers, the *Edinburgh* and *Leith* shipping company, gave an acknowledgement, dated 21st *April* 1815, that they had received the goods from the plaintiff, to be shipped at *Leith* in the *Hope*, deliverable at the *Glasgow* wharf, *London*. Upon this evidence *Gibbs* C. J. was of opinion, upon the first ground of defence, that as there had been an absolute delivery of the goods to the plaintiff, the right of stoppage *in transitu* was at an end. But upon the second point, he thought it was a question for the jury, whether *Cross* and Co. had merely made an improvident sale, or whether the defendant had proved that the plaintiff had fraudulently obtained the goods. If the jury thought that the plaintiff went down to *Scotland*, having formed a deliberate plan to put off bad bills for valuable merchandizes, knowing the goods would never be paid for, and intending then to abscond with the goods, or to throw them into an immediate bankruptcy, or to pass them over to a particularly favoured creditor, his Lordship was of opinion that the plaintiff had been guilty of a fraud, and that the sale would not change the property; but if the plaintiff only meant to give these bills, and himself, by these bills, more credit than they deserved; but intended to continue to carry on his business, and to try to pay for the goods at some time or other, if he could, that was not such a fraud as would vitiate the sale. The jury told his lordship that they believed that this was a fraudulent transaction, undertaken knowingly, and with intent to defraud *Cross* and Co. of their goods; and they accordingly found a verdict for the defendant: and the Court of Common Pleas afterwards refused a rule for setting aside the verdict, and declared their opinion, that under the guards which the learned Judge had stated the proposition to the jury, he had stated it correctly.

So in the case of the *Earl of Bristol v. Wilsmore*, (h) which was an action on the case for seizing and taking part of a flock of sheep which had been seized and taken in execution. At the trial before *Abbott* Ch. J. it was proved, on the part of the plaintiff, who was the chief steward of the liberty of *Bury St. Edmund's*, and by whose bailiff the writ had been executed, that in the course of the night after the sheep had been seized in execution, and whilst they were in the custody of the officer, in a field belonging to *Miller*, next adjoining to a meadow belonging to the defendant *Wilsmore*, *Page* had made a passage for the sheep into *Wilsmore's* field; and that the latter had impounded them; and the next morning delivered them to *Page*, upon his paying the alleged amount of the damage done. This appeared to have been a contrivance between *Wilsmore* and *Page*, in order to enable the latter to obtain possession of the sheep. On the part of the defendant it was proved, that *Miller* had ob-

(h) 1 Barn. and Cres. 514.

tained the sheep from *Page* under the following circumstances: they were offered to him for sale on *Wednesday* the 16th *May* 1821, by *Lemon*, the servant of *Page*; and *Miller* agreed to pay 78*l.* in ready money for them. The bargain being made, the sheep were driven by *Lemon* to the house of *Miller* at *Nayland*, about nine miles from *Colchester*; upon their arrival there, *Miller* prevailed upon *Lemon* to accept a check for 78*l.* upon *Miles* and Co., bankers at *Colchester*, by assuring him that it was as good as money. *Miller's* account at the bankers had been overdrawn for some months before this transaction took place. *Lemon* then left the sheep in *Miller's* possession; *Page*, after keeping the check for two days, presented it at the bankers, and payment was refused. On the very day the sheep were obtained from *Lemon*, *Elizabeth Carver*, who was sister-in-law to *Miller*, went with him to the office of an attorney at *Colchester*, who was an entire stranger to them, and gave him instructions to prepare a warrant of attorney, which was done accordingly; and upon that, judgment was entered up, and execution issued against *Miller*, under which the sheep in question were taken. *Miller* absconded, and was not afterwards heard of. Upon these facts it was contended, on the part of the defendant, that no property in the sheep was vested in *Miller* by the sale, he having obtained possession of them by fraud. On the part of the plaintiff it was contended, that the property did pass, inasmuch as there was no false representation made to induce *Page* to part with the possession of the sheep; and the case of *Rex v. Lara* was cited. (i) The Lord Chief Justice, upon the authority of that case, was of opinion that the property had passed to *Miller*, and without submitting the fact of fraud to the jury, directed them to find a verdict for the plaintiff, which they accordingly did for 78*l.* But a rule for a new trial was afterwards obtained; and the Court, upon argument, determined that the question of fraud should have been submitted to the jury; and the Chief Justice then said, "Upon further consideration we are all of opinion that there ought to be a new trial. If *Miller* contracted for and obtained possession of the sheep in question with a preconceived design of not paying for them, that would be such a fraud as would vitiate the sale; and according to the cases which have been cited, would prevent the property from passing to him. Whether he obtained possession of the goods with such a preconceived design, is a question of fact which ought to be left to the jury; and for that purpose the case must go down to a second trial. At the former trial, the cases of *Noble v. Adams*, (k) *Rex v. Jackson*, (l) and *Read v. Hutchinson*, (m) were not cited. If the property in the sheep had not passed to *Miller*, it is clear that the plaintiff was not entitled to the possession of them against the defendants; for the plaintiff had a right to seize

(i) 6 Term Rep. 565.

(k) Ante, 172.

(l) 3 Campb. 370.

(m) Ante, 171.

under the *feri facias* the property of *Miller* only: unless the sheep, therefore, had become the property of *Miller* the plaintiff had no right to take them, and still less to retain possession of them as against the rightful owner."

15. OF THE SALE OF SMUGGLED GOODS ; OR OF
LIBELLOUS PRINTS, &c.

In a former part of this work, we have seen that contraband or smuggled goods are such as are prohibited by act of parliament, or the King's proclamation, either to be imported into, or exported out of this country: and that if any contract for the sale of goods of this description be made in this country it is void, and no action will lie thereon. (x) But where the contract and delivery of goods are complete abroad, and the seller does no act to assist the smuggling them into this country, such a contract is valid, and may be recovered upon here. Thus, in the case of *Holman and others v. Johnson*, (o) which was an action of assumpsit for goods sold and delivered; at the trial, a verdict was found for the plaintiff. But upon a rule to show cause why a new trial should not be granted, Lord *Mansfield* reported the case, which was shortly this: "The plaintiff, who was resident at, and an inhabitant of *Dunkirk*, together with his partner, a native of that place, sold and delivered a quantity of tea, for the price of which the action was brought, to the order of the defendant, knowing it was intended to be smuggled by him into *England*: they had, however, no concern in the smuggling scheme itself, but merely sold his tea as they would have done to any other person in the common and ordinary course of their trade." In support of the rule it was insisted, that the contract for the sale of this tea being founded upon an intention to make an illicit use of it, which intention and purpose was with the privity and knowledge of the plaintiff, he was not entitled to the assistance of the laws of this country to recover the value of it. He cited *Huberus*, 2 vol. 538, 9. and *Robinson v. Bland*, to show that the contract must be judged of by the laws of this country, and consequently that an action for the price of the tea could not be supported here. But the Court determined, that as the sale and delivery was complete at *Dunkirk*, and there was no evidence to show that the plaintiff had any concern in running the tea into *England*, he was entitled to recover.

Lord *Mansfield* Ch. J. said: "There can be no doubt but that every action tried here must be tried by the law of *England*; but the law of *England* says, that in a variety of instances, with regard to contracts legally made abroad, the laws of the country where the cause of action

(x) Ante, 64. and the several cases (o) Cowp. 341. et. vid. *Hodgson v. Temple*, 5 Taunt. 181.

across shall govern. There are a great many cases which every country says shall be determined by the laws of foreign countries where they arise. But I do not know how the principles on which that doctrine obtains, are applicable to the present case. For no country ever takes notice of the revenue laws of another. The objection that a contract is immoral or illegal, as between plaintiff or defendant, sounds, at all times, very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may so say. The principle of public policy is this: *ex dolo malo non oritur actio*. No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causâ*, or the transgression of a positive law of this country, there the Court says, he has no right to be assisted. It is upon that ground the Court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So, if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it; for where both are equally in fault, *potior est conditio defendentis*. The question therefore is, whether, in this case, the plaintiff's demand is founded upon the ground of any immoral act or contract, or upon the ground of his being guilty of any thing which is prohibited by a positive law of this country. An immoral contract it certainly is not; for the revenue laws themselves, as well as the offences against them, are all *positivi juris*. What then is the contract of the plaintiff? It is this; being a resident and inhabitant of *Dunkirk*, together with his partner, who was born there, he sells a quantity of tea to the defendant, and delivers it at *Dunkirk*, to the defendant's order, to be paid for in ready money there, or by bill drawn personally upon him in *England*. This is an action brought merely for goods sold and delivered at *Dunkirk*. Where then, or in what respect, is the plaintiff guilty of any crime? Is there any law of *England* transgressed by a person making a complete sale of a parcel of goods at *Dunkirk*, and giving credit for them? The contract is complete, and nothing is left to be done. The seller, indeed, knows what the buyer is going to do with the goods, but has no concern in the transaction itself. It is not a bargain to be paid in case the vendee should succeed in landing the goods; but the interest of the vendor is totally at an end, and his contract complete by the delivery of the goods at *Dunkirk*. To what a dangerous extent would this go if it was to be held a crime. If contraband cloths are bought in *France*, and brought home hither; or if glass bought abroad, which ought to pay a great duty, is run into *England*; shall the *French* taylor, or the glass manu-

facturer stand to the risk or loss attending their being run into *England*? Clearly not. Debt follows the person, and may be recovered in *England*, let the contract of debt be made where it will; and the law allows a fiction for the sake of expediting the remedy. Therefore I am clearly of opinion, that the vendors of these goods are not guilty of any offence, nor have they transgressed against the provisions of any act of parliament. The gist of the whole turns upon this, that the conclusive delivery was at *Dunkirk*. If the defendant had bespoke the tea at *Dunkirk* to be sent to *England* at a certain price; and the plaintiff had undertaken to send it into *England*, or had had any concern in the running it into *England*, he would have been an offender against the laws of this country. But upon the facts of the case, from the first to the last, he clearly has offended against no law of *England*."

But, if a vendor of goods abroad knows, at the time of the sale and delivery, that the goods are to be smuggled into this country, and gives his assistance to the vendee, by packing them in a particular manner for smuggling, with intent to aid that purpose, he cannot recover the value of the goods sold, even though he be a *foreigner* resident abroad. Thus, in the case of *Waymell v. Reed* and another, (p) which was an action of *assumpsit* for goods sold and delivered; and the defence was, that the contract was a smuggling transaction. And it appeared in evidence, that the defendants had applied to the plaintiff, who was a foreigner living at *Lisle*, for a quantity of lace, which he knew was intended to be smuggled into *England*; for that purpose it was packed by the plaintiff in a peculiar manner, by the direction of the defendants, for the more easy conveyance of it without a discovery. The Court determined, that the plaintiff could not, under the circumstances, recover for the goods sold. And Lord *Kenyon* Ch. J. said, "It is not necessary to inquire now whether or not it be immoral for the native of one country to enter into a contract with the subject of another, to assist the latter in defrauding the revenue laws of his country. It is sufficient, in order to dispose of this case, to advert to the distinction laid down by Lord *Mansfield* in *Holman v. Johnson*, to which I entirely subscribe; that where the contract and delivery of goods are complete abroad, and the seller does no act to assist the smuggling them into this country, such a contract is valid, and may be recovered upon here. But here the plaintiff was concerned in giving assistance to the defendants to smuggle the goods, by packing them in the manner most suitable for, and with intent to aid that purpose. He cannot therefore resort to the laws of this country to assist him in carrying his contract into execution."

So, in the case of *Biggs and others v. Lawrence*, (q) it was determined, that an action cannot be maintained by several partners for goods sold

(p) 5 Term Rep. 599. See also *Clugas v. Penaluna*, 4 Term Rep. 466. S. P. (q) 5 Term Rep. 484.

by one of them living at *Guernsey*, and packed by him in a particular manner for the purpose of smuggling, though the other partners, who resided in *England*, knew nothing of the sale; for it is a contract by subjects of this country made in contravention of the laws: and this case must be considered in the same light as if all the partners lived in *England*.

But, though it is required by the stat. 29 Geo. 3. c. 68. s. 30., that every person who shall deal in tobacco shall first take out a licence under a penalty; yet the Court of King's Bench held, that a factor selling a parcel of prize manufactured tobacco, consigned to him from his correspondent at *Guernsey*, of which a regular entry was made on importation, but without having entered himself with the *Excise Office* as a dealer in tobacco, or having any licence as such, may nevertheless maintain an action against the vendee for the value of the goods sold and delivered, upon the ground that there was no fraud upon the revenue, nor any clause making the contract illegal; but at most it was the breach of a mere revenue regulation, which was protected by a specific penalty. (r)

OF THE SALE OF OBSCENE OR LIBELLOUS PRINTS.] — No action will lie upon a contract for the sale of prints of an obscene, immoral, or libellous tendency. Thus, in the case of *Fores v. Johnes*, (s) which was an action of *assumpsit* for prints sold and delivered. The plaintiff was a printseller in a *Piccadilly*; and the action was brought to recover the value of a quantity of caricature prints sold by him to the defendant. The order, as proved to have been given by the defendant to the plaintiff, was, "For all the caricature prints that had ever been published." Under this order, the prints in question, had been sent to the defendant's house in *Wales*. The defendant refused to receive them, on the ground, that the collection contained several prints of obscene and immoral subjects, exclusive of several being duplicates. The plaintiff's counsel contended, that the order was general and comprehensive, without any exception as to the subject; and that the plaintiff, therefore, having sent prints of every description was entitled to be paid for them. *Sed, per Lawrence, J.* "For prints, whose objects are general satire or ridicule of prevailing fashions or manners, I think the plaintiff may recover; but I cannot permit him to do so for such whose tendency is immoral or obscene; nor for such as are libels on individuals, and for which the plaintiff might have been rendered criminally answerable for a libel."

(r) *Johnson v. Hudson*, 11 East Rep. 180.

(s) 4 Esp. Rep. 97.

16. OF CREDIT UPON SALES, AND THE TIME AND MODE OF PAYMENT; AND IN WHAT CASES PAYMENT MAY BE RESISTED, UPON THE GROUND OF FRAUD; AND WHEN THE STIPULATED PRICE MAY BE REDUCED TO A *QUANTUM VALEBANT*.

1. OF CREDIT GIVEN UPON THE SALE OF GOODS.] — When a tradesman gives credit for goods *at the time of the sale*, he cannot bring an action till the time of credit has expired; but if the credit is given or extended *after the sale*; or if the buyer has acted fraudulently in obtaining the credit, as well as the goods, the tradesman need not wait the full time, but he may sue the buyer for his debt immediately. Thus, in the case of *De Symons v. Minchwick*, (t) which was an action of *assumpsit* for goods sold and delivered: and upon the trial, the defence was, that the action was brought before the time of credit had expired. In the course of the evidence it appeared, that the plaintiff had sold jewels to the defendant to the amount of 500*l.* for ready money, as the plaintiff asserted; but as a witness for the defendant proved, on information from the plaintiff himself, to be paid for on the 1st of *November*, subsequent to the bill of parcels, before which time, namely, on the 22d of *October*, the action had been commenced. To rebut this defence, the plaintiff proved, that almost immediately after the sale, the defendant had pawned the jewels with different pawnbrokers, and that suspecting the defendant not to be the person he represented himself to be, he had arrested him before the time alluded to. *Eyre* Ch. J. said, "If the credit given was voluntary, subsequent to, and not making any part of the original contract, it certainly might at any time be retracted: but if it made part of the contract, it is so material a part of it, that if the action be brought within the time limited for credit, it cannot legally be supported, unless it was not a *bonâ fide* purchase at the time by the vendee; for if he meant to impose on or defraud the vendor of his goods, the defence will not avail. But those are circumstances for the consideration of the jury only, to whom he left it." The jury (which was a special one) found a verdict for the defendant.

So, when goods are sold upon a contract that the vendee shall pay for them *in three months, by a bill of two months*, it is a credit of *five months*; and therefore no action of *assumpsit* for goods sold and delivered can be brought at the end of *three months*, upon the neglect of the vendee to give his bill at *two months*; the remedy being by a special action on the case for damages, for the breach of contract in not giving such bill. Thus, in the case of *Mussen v. Price* and another, (u) which was an

(t) 1 Esp. Rep. 450. et vid. 2 Esp. Rep. 523. 4 East Rep. 76. S. P.

(u) 4 East Rep. 147. See also *Dutton v. Solomonson*, 3 Bos. & Pul. 582. *Hickling v. Hardey*, 1 Mo. 61.

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action of *assumpsit* for goods sold and delivered; and the only question was, whether the action was commenced before the time of credit on which the goods in question had been contracted to be brought was expired? Payment for the goods was to be made by the defendants in three months after the 15th of *September* 1802, (the day on which the bargain was concluded) by a bill at two months. The action being commenced before the expiration of five months from the 15th of *September* preceding, the defendant's counsel objected that it was prematurely brought, and therefore that the plaintiff should be nonsuited; but the learned Judge held, that unless the defendants could show (which they did not do) that they had given or tendered such a bill at the end of the three months, the action would lie for goods sold and delivered. Accordingly, the plaintiff recovered; but the point was saved for the consideration of the Court of *King's Bench*. And a motion was made for a rule to set aside the verdict, and for leave to enter a nonsuit. This rule was granted principally upon the authority of a case, *Miller v. Shawe*, tried at *Lancaster Lent* assizes, 1801, before Mr. Justice *Chambre*, which was stated to be as follows: (v) "Action for goods sold and delivered. The plaintiff's evidence proved, that the goods were sold at two month, and two months, that is, to be paid for at two months by a bill at two months; which the witness considered as cash at four months. The action was brought before the expiration of the four months, and the declaration was in the usual form, containing the usual counts of *indebitatus assumpsit*, and *quantum valebant* for the amount. *Topping* for the defendant, contended, that no debt existed at the commencement of the action, nor till the four months were expired; but that the plaintiff might have brought his action after the expiration of the two months, and before the end of the four months, upon a breach of his contract for the non-delivery to him of a bill; but that no action of *indebitatus assumpsit* would lie till the end of the four months. *Cockell*, serjeant, and *Yates* contended, that as the defendant had not given the bill at the end of the two months, they might abandon the contract, and recover the price of the goods for want of the bill, which, if given, the plaintiff was to accept in lieu of the money. And *Chambre J.* at first seemed to be of that opinion, but on hearing *Topping*, for the defendant, as above, he thought that after the four months the plaintiff need not have declared on the contract, but the money being then due and unpaid, he might declare in the usual way, and recover the price as a debt on an *indebitatus assumpsit*. Before that time, however, he thought the plaintiff's only remedy was for damages for a breach of the promise in not delivering the bill at two months: and the plaintiff was nonsuited. And in the principal case,

(v) Vide 4 East Rep. 149.

after argument, the Court of *King's Bench* determined, that the action for goods sold and delivered, could not be sustained till the end of five months; and accordingly made the rule absolute for setting aside the verdict, and entering a nonsuit. And *Le Blanc* Just. said, "I think this action was brought before the time of credit had expired. Here is an express promise proved between the parties, the seller was to stand upon the credit of the defendant alone for three months, and then he was to have in addition a third person's credit for two months longer; so that altogether the defendant was to have credit for five months before he was called upon to pay, but he will not have the benefit of his contract, if he be called upon for the full sum, before the expiration of the five months' credit."

If, however, the goods are not paid for at the end of the *five* months, the vendor may recover the price of them in an action of *indebitatus assumpsit* for goods sold and delivered.^(w) And when goods are sold without any agreement as to the time or mode of payment, and there is no custom to regulate the time of payment; if the vendee give a bill, drawn on a third person, payable at a future day, for the amount of the goods; but upon presentment of the bill for acceptance it is dishonoured, the vendor may immediately sue the vendee for the price of the goods, and consider the bill as a nullity.^(x) But if there be an express contract to give credit for a certain time, and a bill is given as a security, the vendor must wait the full time of credit, though the bill should be previously dishonoured, or the vendee become insolvent.^(y)

So, if goods are sold upon a contract that they shall be paid for by a bill to be drawn at a future day, payable at so many months' date, the vendor must draw the bill, and tender it to the vendee for acceptance, though the latter may have dishonoured several of his acceptances between the time of the sale, and the period at which the bill is to be drawn. Thus, in the case of *Reed v. Mestaer* (z), which was an action of *assumpsit* for breach of promise in not giving a bill under the following written agreement: "Agreed on the 15th October, 1802, with *Peter Everitt Mestaer, Esq.*, for one hundred tons of cordage at 56*l.* per ton, the date to commence from that day, and to be paid by bill at twelve months from the 15th October, 1803, with interest added. (Signed) *S. Reed.*"—At the trial, the plaintiff merely proved, the delivery of the cordage, the bill of parcels, and the value. But the counsel for the defendant called a witness, who proved the above agreement, and that the defendant was ready, and had offered to accept a bill on the 15th of October, 1803, to be drawn by the plaintiff upon the defendant for the

(w) *Brook v. White*, 1 New Rep. 330. 15 East Rep. 13. 7 Term Rep. 66.; and

(x) Vide *Owenson v. Morse*, 7 Term Rep. 64. *Puckford v. Maxwell*, 6 Term Rep. 52. 4 East Rep. 155. see 4 East Rep. 75.

(y) *Stedman v. Gooch*, 1 Esp. Rep. 5. (z) At Guildhall Sitt. aft. Hil. Term, 1804, coram Lord *Ellenborough* Ch. J. MSS.

one hundred tons of cordage; that the plaintiff refused to take the defendant's acceptance, because he had previously dishonoured several of his bills; but was ready to take the acceptance of some other person to the plaintiff's satisfaction. The cause was tried before a special jury of merchants; and, as soon as the agreement was read, the jury declared, that they were all of opinion, that by the course of dealing among merchants, upon such an agreement, the bill ought to have been drawn by the seller upon the buyer, and by him accepted; and not that the defendant should tender a bill accepted by another person to the plaintiff's satisfaction, as contended for by the counsel for the plaintiff. And Lord *Ellenborough* Ch. J. said, "that under this agreement it was certainly a question for the jury to say what sort of bill was understood between the parties." The plaintiff was therefore nonsuited.

So, where goods are sold upon a credit for six or nine months, the buyer may elect which period he will take; and if payment is not made at the end of six months, it will be presumed that he has elected the longer period. (a) But where, upon a contract for the sale of goods, it was agreed to give three months' credit, and that if the buyer, at the end of that period, wished for further time, the vendor would take his bill of exchange for the amount, payable in three months more. It was contended that this, in fact, constituted a credit for six months; and that the plaintiff (the vendor) having brought his action before the expiration of that time, must be nonsuited; and the case of *Mussen v. Price* was cited. But Lord *Ellenborough* held, that the action was not premature; the plaintiff had agreed, if the defendant wished it, to give further time; but the defendant was to give to the plaintiff his bill at three months, as the price of that indulgence. It was therefore incumbent upon him to give such a bill, if he wished to avail himself of the indulgence offered to him." (b)

2. OF PAYMENT FOR GOODS SOLD.]—If an agreement is made for the sale of goods at a particular price, without either payment or mention of payment, the contract shall be void if the vendee do not pay, or offer to pay for them upon delivery; because in every bargain, payment ought to be made on the delivery of the goods, except where a future day is agreed upon between the buyer and seller: and this is to be done notwithstanding earnest be given upon the bargain; for that only makes the contract complete. (c) But though where goods are sold upon an agreement to pay for them in ready money, yet if the goods happen to be delivered to the vendee without payment, and an action is afterwards brought for the price; and it happens that the vendor, at the time of delivery was indebted to the vendee in a sum of money equal to the

(a) *Price v. Niron*, 5 Taunt. 538.

(b) *Nickson v. Jepson*, 2 Stark. 227.

(c) *Dy. 20. a.* Hob. 41. 2. Bro. Con-

tract, 25, 26. Kit. 181. b. See also *More-*

ton v. Lamb, 7 Term Rep. 125. *Rogson*

v. Johnson, 1 East Rep. 203. Bul. N.P. 50.

amount of the goods sold, the vendee may set off his debt against the amount of the goods, notwithstanding the agreement to pay ready money. Thus, in the case of *Eland v. Karr* (d), which was an action of *indebitatus assumpsit* for goods sold and delivered, the defendants pleaded a set-off for money due upon various bills of exchange, and also for money had and received on the 14th March 1800. Replication that on the 22d March 1800, it was agreed between the plaintiff and defendants that the defendants should pay to the plaintiff for the goods in ready money. To this replication there was a general demurrer; and in support of which it was contended, that an agreement to pay for goods in ready money admits of a set-off in the same manner as any other debt; and that the agreement to pay for the goods on delivery is merely to ascertain the time of payment. On the other side it was argued, "that a party who contracts to pay for goods in ready money could not substitute any other mode of payment; and that this was an attempt to substitute the set-off of another debt in lieu of money; and that too in a case where the damages are unliquidated. But the Court determined, "that as at the time of the commencement of the plaintiff's action, which was the time to be regarded, there was a debt due from the defendant to the plaintiff, the latter was entitled under the statute 2 Geo. 2. c. 2. to set it off; that no objection arose from the damages being unliquidated; for that was the case in all actions of *assumpsit*, when damages are claimed for a breach of contract in non-payment of money." Where A. sold goods to B. for which the latter was to pay in three months by a bill at three months; a few days after the expiration of three months B. gave to A. a cheque on his bankers (who were also the bankers of A.) requiring them to pay A. on demand, in a bill at 70 days; and A. paid the cheque into the bankers' hands, and took no bill from them, but the amount was transferred in the bankers' books from B.'s account to A.'s, with the knowledge of both; the bankers having failed before the time when the bill which was originally intended to be given would have become due, a question arose whether A. could recover the value of the goods against B., and the Court of *King's Bench* held, that it was a valid payment, and that A. could not recover. (e)

If goods are to be paid for by a bill upon the agent of the buyer, he is not discharged by the seller's taking a renewal of the bill from the agent, without giving the purchaser notice, if the agent had no funds of the purchaser in hand, to pay the bill when it became due. (f) But if a creditor prefer a bill of exchange, accepted by a third person, to ready money, from his debtor, he must abide by the hazard of the security. But if an agent of the debtor offer the creditor payment in cash, or by

(d) 1 East Rep. 375. *Comforth v. Riocott*, 2 Maule & Sel. 510. S.P.

(e) *Bolton v. Richard*, 6 T.R. 139.

(f) *Clark v. Noel*, 3 Campb. 411.

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a cheque on his banker, and the creditor prefer the cheque, this will not discharge the debtor if the cheque be dishonoured; although the agent failed with a balance of his principal in his hands to a large amount. (g)

If a bill of exchange or banker's cheque is given in payment for goods sold, and it is afterwards lost by the vendor, he cannot recover against the vendee upon the original consideration until he has fully indemnified the vendee against the bill or cheque. (h) And it was held, in the case of *Pierson v. Hutchinson* (i), that an indorsee of a lost bill of exchange could not maintain an action at law against the acceptor, although a bond of indemnity was offered; but it would be otherwise, if it could be proved that the bill had been destroyed. So, where goods are to be paid for by a bill of exchange, and the vendor directs to the vendee a bill by the post, and the bill is so transmitted by the vendee, he will be discharged, though the bill should happen to fall into bad hands, and the amount of it should be received by a third person at the banker's where it was to be paid; and even if there had been no particular direction from the vendor, the law would have been the same, this being the usual way of transacting such business. (k) But where a person in *London* is directed to remit money by the post, he ought either to put it into the post-office in *Lombard Street*, or deliver it at one of the receiving-houses appointed by the post-office; and if he give it to a bellman in the street, he will be answerable in case of its miscarriage. (l)

If one entire contract is made for the delivery and payment of goods, such contract cannot be apportioned, so as to entitle the vendee to payment of the price of part of the goods delivered. He must deliver the whole before the vendee can be legally called upon for payment, unless he refuse to accept the residue. Thus in the case of *Waddington v. Oliver* (m), which was an action of *indebitatus assumpsit* for goods sold and delivered; and it appeared, that on the 10th of *September* 1804, the plaintiff agreed with the defendant to sell him 100 bags of *Kent* hops, merchantable, of the growth of 1804, at 56s. per hundred weight, to be delivered on or before the 1st of *January* 1805, as it might be agreeable to the plaintiff; that on the 12th of *December*, 12 bags were delivered; and on the same day, or the next, payment thereof was demanded, which being refused, the writ was sued out on the 13th of *December*. For the plaintiff it was urged, that as no time was stipulated for payment, the defendant was bound for them as they were delivered. The Court, however, were clearly of opinion that the contract was entire, and could not be split; and that the plaintiff therefore had no right to bring an action until the whole was delivered, or until the time for delivering the whole had arrived. But where A. in consideration

(g) *Everett v. Collins*, 2 Campb. 515.; and see *Tapley v. Martin*, 8 Term Rep. 451.; *Marsh v. Pedder*, 4 Campb. 257.

(h) *Bevan v. Hill*, 2 Campb. 381.

(i) *Ibid.* 211.

(k) *Warwicke v. Noakes*, Peake, 67. a.

(l) *Hawkins v. Rutt*, Peake, 186.

(m) 2 New Rep. 61.

that B. had bargained and sold to him certain tuns of strong beer, promises B. to pay him 4*l.* for every tun *super deliberationem inde* of thirty tuns of strong beer: an action lies upon this promise for so many tuns as he delivers, before the delivery of all the thirty tuns. (n)

Where goods are delivered upon an agreement to take a specific parcel of copper money in payment; a delivery of such copper is a good bar to an action for the value of the goods, though in fact it was counterfeit money, but unknown to the defendant. (o) But where A. agrees to purchase of B. a gun for the sum of forty-five guineas, but it is stipulated, that B. shall take a gun of A.'s, valued at thirty guineas in part payment, A. having refused to deliver his gun, and complete the contract, B. is entitled to recover the sum of forty-five guineas as the stipulated price. (p) So, upon an agreement between two traders to supply each other with goods for goods, after a balance is struck between them, such balance is to be paid in money. (q)

Where a quantity of iron was sold and delivered, under a contract that certain bills, outstanding against the plaintiffs, should be taken out of circulation. After a part of the iron had been delivered, and no bills had been taken out of circulation, the plaintiff stopped the farther delivery, and brought trover for what had been delivered. For the defendant it was contended, that trover would not lie, and that the only remedy for the plaintiff was, to bring an action for the breach of the contract by the defendant. But the Court held, that this was only conditional delivery, and the condition being broken, the plaintiff might bring trover. And Abbot Ch. J. said, "He had left it to the jury to say, whether the delivery of the iron and the redelivery of the bills, were to be contemporary, and that the jury found that fact in the affirmative." And Bayley J. added, "That if a tradesman sold goods to be paid for on delivery, and his servant by mistake delivers them without receiving the money, he may, after demand and refusal to deliver or pay, bring trover for his goods against the purchaser." (r)

3. IN WHAT CASES PAYMENT MAY BE RESISTED WHOLLY, UPON THE GROUND OF FRAUD.]—It is a maxim of the common law, that "*fraud vitiates everything*;" consequently every contract founded in fraud is void. So that the vendor of goods cannot recover the value of any article which he has sold to another under any practised artifice or deceit; and he is not protected, as we have before seen (s), though one of the terms of the contract is, that the article sold shall be taken "with all faults," where he knows of any secret defects, and uses means to prevent the pur-

(n) Rol. Abr. 29. pl. 2. 1 Dan. Abr. 62. pl. 2.

(o) 1 Term Rep. 225.

(p) *Forsyth v Jervis*, 1 Stark. 437.

(q) Ante, 130. *Ingram v. Shirley*, 1 Stark. 185.

(r) *Bishop v. Shillito*, 2 Barn. and Ald. 329, n. 2

(s) *Schneider v. Heath*, ante, 121.

chaser discovering them, or makes a false representation at the time of the sale. So; where the agent of a vendor of a picture, knowing that the vendee erroneously believed it to be the property of a particular individual, for whom the agent was at that time employed in selling a number of pictures, which belief influenced the vendee's judgment, permitted him to make the purchase without removing the delusion, Lord *Ellenborough*, at *Nisi Prius*, held the sale fraudulent and void (t). But in the case of *Grimaldi v. White*, (u) which was an action of *assumpsit* for work and labour, &c. The defendant paid a certain sum of money into court, and pleaded the general issue of *non assumpsit*. The action was brought by the plaintiff, who was a miniature painter, to recover the value of several pictures painted by him for the defendant. Upon the trial it was proved, that the plaintiff painted miniatures of different sizes, according to which the prices varied. Specimens were hung up in his apartment, numbered; and the prices put opposite to the number. The price opposite No. 8. was fifteen guineas, which number the defendant had had. The pictures had been sent home, and the defendant, at the time, objected to the execution, as being inferior to the specimen exhibited by the plaintiff; but he had not returned them. The defence, upon which it was intended to rely, was this inferiority of execution, and of course of value; and the defendant's counsel were proceeding to call witnesses, who were judges, and who had seen the pictures, to prove, that at fifteen guineas they were infinitely overcharged, and to ascertain what was the real value. This, however, was objected to by the plaintiff's counsel. And *Lawrence J.*, before whom the cause was tried, said, "In this case it is in evidence, that the charges of the plaintiff are regulated by the different sizes of the pictures, which he exhibits as specimens of his art, and for which he charges the different sums set opposite to the numbers. It is proved, that he has delivered several pictures to the defendant of the size which he ordered, and which the defendant received, and has not returned. The defendant relies on the circumstances, that they are of an execution very inferior to the specimens exhibited, and which the plaintiff undertook to paint conformable to. Where an artist exhibits specimens of his art and skill as a painter, and affixes a certain price to them, if a person is induced to order a picture from an approbation of such specimens, and the execution of it, when delivered, is inferior to the specimen exhibited, he has a right to refuse to receive it, and to return it, as not being conformable to that performance which the painter undertook to execute; but if he means to avail himself of that objection, he must return the pictures, he must rescind the contract totally. Having received it under a specific contract, he must either

(t) *Hill v. Gray*, 1 Stark. 434.

(u) 4 Esp. Rep. 95.

abide by it, or rescind it *in toto*, by returning the thing sold; but he cannot keep the article received under such a specific contract, and for a certain price, and pay for it at less price than that charged by the contract." The plaintiff accordingly had a verdict for the full charge.

3. WHEN THE STIPULATED PRICE MAY BE REDUCED TO A *QUANTUM VALEBANT*.] — In an action for the agreed price of goods sold by sample or warranty, it is competent to the vendee to prove, that the goods do not correspond with the sample or warranty, and that they are much inferior in quality and price to those contracted for, in order to shew the real value of the goods, and to prevent the vendor from receiving the stipulated price. (v) And it was once doubted by Lord *Ellenborough* Ch. J., in the case of *Fisher v. Samuda*, (w) whether the vendee of goods, which had been sold upon a warranty, after an action had been brought against him by the vendor for the stipulated and agreed price, and in which he did not either in bar of the action, or to reduce the damages, make any objection to the quality or value of the goods, but allowed the vendor to recover the full sum agreed to be paid, could maintain an action for damages for a breach of the warranty. But where goods have been sold by sample at a stipulated price, and they turn out upon examination, to be inferior to the sample, and an action of *indebitatus assumpsit* is brought for the amount, and in which action the buyer pays into court a sum short of the agreed price, as upon a *quantum valebant*, not having previously returned or offered to return the goods, Lord *Ellenborough* Ch. J. held, that the buyer was precluded from going into evidence of any defects in the goods, or of their real value, upon the ground that by payment of money into Court, he admits the contract and the price, and loses the ground of defence which he might have had, in not making the objection in proper time, and returning the goods, or offering to return them. (x)

So, where a bill of exchange is given in payment for the piece of goods sold, and the goods be but partially inferior to those which were ordered and warranted, the buyer cannot legally defend himself against the payment of the whole amount of the bill, but his only remedy in such case is, by action for damages upon the warranty. This was settled in the case of *Morgan v. Richards*, (y) which was an action against the acceptor of a bill of exchange at the suit of the drawer, the bill being payable to his own order. The defence was, that the bill had been accepted for the price of some hams bought by the defendant from the plaintiff, to be sent to the East Indies, and that the hams had turned out so very bad, that they were almost quite unmarketable; the sum

(v) *Germaine v. Barton*, 5 Stark. 32., and the cases there cited in note a.

(w) 1 Campb. 190.

(x) *Leggett v. Cooper*, 2 Stark. 103.

(y) 1 Campb. 40. n. a. Et vide *Dixon v. Clifton*, 2 Wils. 319. *Baxter v. Butler*, 7 East Rep. 479. and the cases there cited.

for which they actually sold was paid into Court. Lord *Ellenborough* held, "that though where the consideration of a bill of exchange fails *entirely*, this will be a sufficient defence to an action upon it by the original party; it is no defence to such action that the consideration fails *partially*, but that under such circumstances, the giver of the bill must take his remedy by an action against the person to whom it was given."

So, in the case of *Fleming v. Simpson*, (2) which was also an action by the indorsee of a bill of exchange against the acceptor. This bill was drawn by *Fleming, Goodall, and Co.*, and accepted by the defendant for the amount of a pipe of *best London particular Madeira*, which he had ordered of them. The defence set up was, that the wine was of very bad quality when delivered in *London*, and could not have been *best London particular Madeira when shipped*, and that the indorsee was a partner in the house of the shippers. But Lord *Ellenborough* said, "By delivery on board the ship, the wine became the property of the defendant, and he must bear all risks, and bring his action against the captain if the wine be spoiled in its passage. To sustain this defence, it must be shewn not only that the plaintiff is a partner in the house of *Fleming, Goodall, and Co.*, who drew the bill, but that there was a fraud on their part in the first instance, in shipping a commodity of a different and very inferior quality to that ordered. If it was a clear fraud in the shippers, and the plaintiff was a partner in their house, he could not recover on this bill; but this defence is not sufficient, if the commodity shipped be only of *rather an inferior quality of that ordered*."

(2) 1 Campb. 40. n. a.

CHAPTER II.

OF A GUARANTEE OR PROMISE TO BE ANSWERABLE FOR THE DEBT OR DEFAULT OF ANOTHER.

THE subject matter of this chapter may be considered under the following heads, *viz.*

1. OF THE GENERAL NATURE OF A GUARANTEE ; AND OF THE STATUTE OF FRAUDS RELATING THERETO, AND WHAT PROMISES DO OR DO NOT FALL WITHIN IT.
 2. OF THE CONSTRUCTION OF A GUARANTEE, AND ITS EXTENT AND CONTINUANCE ; AND ALSO ITS DURATION WHEN GIVEN TO A PARTNERSHIP FIRM, &c.
 3. OF PROMISES TO BE ANSWERABLE FOR THE DEBT OR DEFAULT OF ANOTHER, IN CONSIDERATION OF FORBEARANCE TO SUE ; OR OF DISCHARGING THE DEBTOR, OR OF GIVING UP SECURITIES, &c.
 4. OF AGREEMENTS TO PAY A PRECEDENT DEBT ON THE CREDITOR'S PROVING IT DUE UPON OATH ; OR OF THE DEBTOR'S FAILING TO PROVE PAYMENT.
 5. OF AGREEMENTS TO PAY A DEBT, &c. ON DELIVERING UP GOODS, &c. SEIZED IN EXECUTION, OR UNDER A DISTRESS FOR RENT.
 6. OF AGREEMENTS MADE WITH SHERIFF'S OFFICERS UPON THE ARREST OF A THIRD PERSON, EITHER TO PUT IN AND JUSTIFY BAIL, OR TO PAY THE DEBT, &c. IN CONSIDERATION OF THEIR LETTING HIM OUT OF CUSTODY WITHOUT A BAIL BOND.
 7. WHAT ACTS DONE BY THE CREDITOR WILL DISCHARGE THE GUARANTEE.
 8. OF THE APPLICATION OF PAYMENTS MADE BY A DEBTOR TO HIS CREDITOR WHILST A GUARANTEE IS IN FORCE.
 9. OF NOTICE TO A SURETY UPON DEFAULT MADE BY THE PRINCIPAL.
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1. OF THE GENERAL NATURE OF A GUARANTEE ; AND OF THE
STATUTE OF FRAUDS RELATING THERETO, AND WHAT
PROMISES DO OR DO NOT FALL WITHIN IT.

A guarantee is generally understood, in a legal sense, to mean a promise or an engagement to be answerable for the debt or default of a third person: and to make such an obligation binding, there must be some good consideration moving from the party with whom it is made; as for instance, the sale and delivery of goods to, or work to be done on credit for the person on whose behalf the guarantee is given; or, in consideration of a creditor giving time, or forbearing to sue his debtor for a precedent debt, and the like. It must also be reduced into writing, and signed; and the consideration must be set forth; for by the second branch of the 4th clause of the statute of frauds 29 Car. 2. c. 3. it is enacted, "that no action shall be brought, whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriages of another person; unless the agreement upon which such action shall be brought or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized." Now in this clause of the statute, though it is expressly declared, that the promise must be to answer for the debt, default, or miscarriage of another, yet many questions have arisen upon the application of these words to particular transactions. One of the leading cases on this subject is, that of *Buckmyr v. Darnall*, (a) which was an action of *assumpsit*, wherein the plaintiff declared, that the defendant, in consideration that the plaintiff at the request of the defendant would let to hire and deliver to one *Joseph English* a gelding of the plaintiff's to ride to *Reading* in the county of *Berks*, undertook and promised the plaintiff that the said *Joseph* would deliver the said gelding to the plaintiff. At the trial before *Holt* Ch. J., the counsel for the defendant insisting, that the plaintiff ought to produce a note in writing of this promise within the statute of frauds; and the Chief Justice doubting of it, a case was made for the opinion of the other judges. And it was argued for the defendant, that this case was within the statute of frauds; for it was a promise to answer for the default and miscarriage of the person the horse was lent to; that the very letting out and delivery of the horse to *English*, implied a contract by *English* to re-deliver it, and he was bound by law so to do, and consequently the defendant was to answer for the default of another. To this it was answered for the plaintiff, that here the credit was wholly given to the defendant; that the rule mentioned by the counsel

(a) 2 Lord Raym. 1085. 6 Mod. 248. S. C.

on the other side must be understood, where an action does or does not lie against the party himself on the contract, and not where an action does or does not lie against him upon collateral respects. And therefore in this case for an actual conversion, or for refusing to re-deliver the horse, *English* might be charged in *trover* or *detinue*; yet he being not chargeable upon the contract, the case was not within the statute. That this contract could not be said properly to be a promise to answer for the default or miscarriage of another, unless *English* were liable by the first contract. The Chief Justice, after several arguments, delivered the opinion of the Court: he said "that the question had been proposed at a meeting of the judges, and that there had been a great variety of opinions between them, because the horse was lent wholly upon the credit of the defendant; but that the judges of the Court of King's Bench were all of opinion that the case was within the statute. The objection that was made was, that if *English* did not re-deliver the horse, he was not chargeable in an action upon the promise, but in *trover* or *detinue*, which are founded upon the tort, and are for a matter subsequent to the agreement. But I answered, that *English* may be charged on the bailment in *detinue* on the original delivery, and a *detinue* is the adequate remedy, and upon the delivery *English* is liable in *detinue*, and consequently this promise by the defendant is collateral, and is within the reason and the very words of the statute; and is as much so, as if, where a man was indebted, J. S. in consideration that the debtee would forbear the man, should promise to pay him the debt; such a promise is void unless it be in writing. Suppose a man comes with another to a shop to buy, and the shop-keeper should say, 'I will not sell him the goods, unless you will undertake he shall pay me for them,' such a promise is within the statute: otherwise, if the man had been the person to pay for the goods originally. So here, *detinue* lies against *English* the principal; and the plaintiff having this remedy against *English* the principal, cannot have an action against the defendant the undertaker, unless there had been a note in writing."

So, if A. promises B., being a surgeon, that if he will cure D. of a wound he will see him paid; this is only a promise to pay if D. does not, and therefore, it ought to be in writing by the statute of frauds. But if A. promise in such a case, that he will be B's paymaster, whatever he shall deserve, it is immediately the debt of A. and he is liable without writing. (b) There is a distinction between a *conditional* and an *absolute* undertaking; as if A. promise to pay B. such a sum if C. does not, there A. is but a security for C. But if A. promise that C. will pay such a sum, A. is the principal debtor; for the act done was on his credit, and no way upon the credit of C. (c)

(b) Per *Holt* Ch. J. 1 *Ld. Raym.* 224.

(c) Per *Lee* Ch. J. *Fitzgib.* 303.

With respect, however, to *the sale of goods*, the settled rule now is, that if the person for whose use the goods are furnished, be liable at all, any other promise by a third person to pay that debt must be in writing, otherwise it is void by the statute. (d) Thus, in the case of *Jones v. Cooper*, (e) which was an action for goods sold and delivered: the facts were these; the defendant had frequently given written orders to the plaintiff to deliver goods of different kinds to one *Smith*, her son-in-law; in all of which she undertook to be answerable for the payment. These had been all punctually discharged. But the goods upon which the present question arose were delivered to *Smith*, in consequence of a *parol* order, and a *parol* promise by the defendant in these words: "I will pay you if *Smith* will not." That the undertaking was before the delivery of the goods; but that *Smith* was entered as the debtor in the plaintiff's books. The Court determined, that the promise by the defendant in this case to pay if *Smith* did not, is a collateral undertaking within the statute of frauds: they said, "it is so clear that it would only be mis-spending time to go through the cases, or to say much about it."

So, in the case of *Matson* and another v. *Wharam*, (f) which was also an action for goods sold and delivered: and the facts were as follow; in January 1785, the defendant *Wharam* applied to *Matson*, one of the plaintiffs, and asked him if he was willing to serve one *Robert Coulthard* of *Pontefract* with groceries; he answered they dealt with nobody in that part of the country, and did not know *Coulthard*; to which the defendant, *Wharam*, replied, "If you do not know him, you know me, and I will see you paid." *Matson* then said he would serve him; and *Wharam* answered, "He is a good chap, but I will see you paid." A letter was afterwards received by the plaintiffs from *Coulthard*, containing an order for goods to the amount of 7*l.* and the goods were afterwards sent to *Coulthard* accordingly. The plaintiffs made *Coulthard* the debtor for these goods in their books. They afterwards applied to *Coulthard* for payment of the debt by letter, and receiving no answer, they then applied to the defendant, *Wharam*, who refused to pay the money. There was no promise in writing made by the defendant; and the question for the opinion of the Court was, whether the plaintiffs were entitled to recover. The Court were of opinion, that this was a collateral promise to pay in case *Coulthard* did not, and therefore within the statute; consequently the plaintiff was not entitled to recover.

And in another case of *Anderson v. Hayman* (g) which was an action of *assumpsit*: at the trial, the jury found a verdict for the defendant on these facts: the plaintiff was a woollen-draper in *London*, and employed one *Biffin* as a rider to receive orders from his customers in the country.

(d) Per *Buller* J. 2 Term Rep. 81.

(e) Cowp. 227.

(f) 2 Term Rep. 80.

(g) 1 H. Bl. 120.

The defendant meeting with *Biffin* at *Deal*, desired him to write to the plaintiff, requesting him to supply the defendant's son (who traded to the *West Indies*) with whatever goods he might want, on his, the defendant's credit, and at the same time said, "Use my son well, charge him as low as possible, and I will be bound for the payment of the money as far as 800*l.* or 1000*l.*" *Biffin* accordingly wrote to the plaintiff the following letter; "Mr. *Hayman* of this town says his son will call on you and leave orders, and he has promised me to see you paid if it amounts to 1000*l.* Mr. *William Pitches* was also present as a witness." N.B. "If deal for 12 months' credit, and pay in 6 or 8 months, expects discount in proportion." — Soon after the son received goods from the plaintiff to the amount of 800*l.* which were delivered to him in consequence of the above-mentioned order from the father. The son was debited in the plaintiff's books, and being applied to for payment, wrote an answer to the plaintiff as follows: "Your favour of the 27th past has been forwarded to me from *Ostend* by my clerk, in answer to which I can only say, that I understood your credit for the goods was 12 months, which was also mentioned by your rider to my father. I shall at this rate make you remittances for the different parcels as they come due, and remain, &c. *Thomas Hayman, junior.*" The son afterwards became a bankrupt, and this action was brought against the father, to recover the value of the goods. The Court, on a motion for a new trial, were clearly of opinion, that this promise, not being in writing, was void by the statute of frauds, as it appeared from the evidence of the letter of *Hayman* the younger, that credit was given to him, as well as the defendant.

But, in the case of *Harris v. Huntbach*, (h) which was an action for money lent; the question for the opinion of the Court was, whether the promise was a collateral or original undertaking. It appeared from the evidence, that one *Davidson* coming to the plaintiff by the defendant's order for money to pay workmen, the plaintiff refused to pay the money unless the defendant would sign a receipt. Whereupon the defendant wrote the following note, viz. "Mr. *Harris* at the request of the gardener, the workmen wanting money greatly, for the work at the woodhouses, this is to certify that it is my request you pay to Mr. *Davidson*, on the account of Master *Hillier*, for the workmen's use, the sum of 15*l.* as witness my hand, *S. Huntbach*," and a receipt was given by the said *Davidson*, the gardener, to the plaintiff, on the plaintiff's paying him this 15*l.* It also appeared that Master *Hillier*, at the time the money was advanced, was an infant, and that the woodhouses belonged to him. The Court determined, that the note amounted to an

(h) 1 Bur. 373.

original undertaking; and that there was nothing like a *collateral* request or promise. And *Foster* Just. said, "The infant was not liable, and therefore it could not be a *collateral* undertaking. It was an *original* undertaking of the defendant."

It is, however, in many cases very difficult to discover from the mere expressions of the party, to whom the credit was originally given; and therefore, in some instances, it is deemed necessary to take into consideration not only the expressions used, but the particular situation of the defendant at the time of his undertaking. Thus, in the case of *Keate v. Temple*, (i) which was an action for goods sold and delivered, and work and labour. The principal facts proved at the trial, before *Lawrence* Just., were these: The plaintiff was a tailor and slop-seller at *Portsmouth*, and the defendant the first lieutenant of his Majesty's ship the *Boyne*. When that ship came into port, the defendant applied to a third person to recommend a slop-seller who might supply the crew with new cloaths, saying, "He will run no risk; I will see him paid." The plaintiff being accordingly recommended, the defendant called upon him and used these words, "I will see you paid at the pay-table; are you satisfied?" He answered, "perfectly so." The cloaths were delivered on the quarter deck of the *Boyne*; slops are usually sold on the main deck; the plaintiff produced samples to ascertain whether his directions had been followed; some of the men said that they were not in want of any cloaths, but were told by the defendant that if they did not take them he would punish them; and others, who stated that they were only in want of a part of a suit, were obliged to take a whole one, with anchor buttons to the jacket, such as are usually worn by petty officers only. The cloathing of the crew in general was light, and adapted to the climate of the *West Indies*, where the ship had been last stationed. Soon after the delivery, the *Boyne* was burnt; and the crew dispersed into different ships. On that occasion the plaintiff, having expressed some apprehensions for himself, was told by the defendant, "Captain *Grey* (the captain of the *Boyne*) and I will see you paid; you need not make yourself uneasy." After this the commissioner came on board the *Commerce de Marseilles*, in order to pay the crew of the *Boyne*; at which time the defendant stood at the pay-table, and having taken some money out of the hat of the first man who was paid, gave it to the plaintiff; the next man refused to part with his pay, and was immediately put in irons. The defendant then asked the commissioner to stop the pay of the crew, who answered that it could not be done.

The learned judge, before whom the cause was tried, in his direction to the jury, said, "that if they were satisfied on the evidence, that the goods in question were advanced on the credit of the defend-

(i) 1 Bos. & Pul. 158.

ant, as immediately responsible, the plaintiff was entitled to a verdict; but if they believed, that at the time when the goods were furnished, the plaintiff relied on being able, through the assistance of the defendant to get his money from the crew, they ought to find for the defendant." The jury found a verdict for the plaintiff 576*l.* 7*s.* 8*d.* But the Court afterwards directed a new trial; and *Eyre* Ch. J. said, "There is one consideration, independent of every thing else, which weighs so strongly with me that I should wish this evidence to be once more submitted to a jury. The sum recovered is 576*l.* 7*s.* 8*d.*; and this against a lieutenant of the navy; a sum so large that it goes a great way towards satisfying my mind that it never could have been in the contemplation of the defendant to make himself liable, or of *the slop-seller to furnish the goods on his credit* to so large an amount. And the question is, whether the slop-seller did not in fact rely on the power of the officer over the fund out of which the men's wages were to be paid, and did not prefer giving credit to that fund rather than to the lieutenant, who, if we are to judge of him by others in the same situation, was not likely to be able to raise so large a sum? Considering the whole bearing of this evidence, I think this a proper case to be sent to a new trial."

Besides the cases already cited, there are many others, in which several distinctions have been taken, as to what promises do or do not fall within this clause of the statute; and from the whole, the following points may be considered as settled; first, that where the party promising is in any respect liable to the original debt or duty, either alone or jointly with others, such promise is not within the statute; secondly, if the promise be made upon a consideration moving to the party promising, it is also out of the statute, even though it be to answer solely for the debt or default of another. But thirdly, where the consideration is a mere indulgence or forbearance to the debtor, and the promise is made upon that consideration alone, such promise is within the statute; and the agreement in such case must not only be in writing, and signed, but the consideration for the promise must also be stated in the agreement. I will now consider them in their order.

1. WHERE THE PARTY PROMISING IS IN ANY RESPECT LIABLE TO THE ORIGINAL DEBT OR DUTY, EITHER ALONE, OR JOINTLY WITH OTHERS.]

— Upon this point the following distinction has been taken, viz. if two come to a draper, and one of them says, "Let this person have so much cloth, and I'll pay you for it;" there the sale is to him only who gives the order, though the delivery be to another; and he alone is liable. But if a contract be made with A., and the vendor scruples to let the goods go without the money; and B. comes to him, and desires him to let A. have the goods, and undertakes that A. shall pay him; in this case A. is the original debtor, and B. is only answerable upon his promise in

case A. makes default in payment. (l) And this distinction will be found throughout all the cases on the subject. Thus, in the case of *Stephens v. Squire*, (m) which was an action of *assumpsit* to pay 10*l.* and costs. The facts were these: an action had been brought against the defendant and two others; and the cause was carried down to be tried at the assizes; but the defendant promised, in consideration that the plaintiff would not prosecute the action, that he would pay 10*l.* and costs of suit. The question was whether this was a void promise by the statute of frauds, it not being in writing? The Court determined, that this could not be said to be a promise for another person, but for the defendant's own debt; and therefore not within the statute.

So, in the case of *Read v. Nash*, (n) the facts were these: *Tuack*, the plaintiff's testator, brought an action of assault and battery against one *Johnson*. The cause being at issue, the record entered, and just coming on to be tried, the defendant *Nash* being then present in court, in consideration that *Tuack* would not proceed to trial, but would withdraw his record, promised to pay *Tuack* 50*l.* and the costs in that cause, to be taxed till the time of withdrawing the record, in which taxation all such sums of money were to be allowed as *Tuack* had paid and was liable to pay to his attorney and witnesses who attended the trial. *Tuack*, relying upon this promise, did withdraw his record, and no further proceeding was had in that cause. *Tuack* being dead, *Read*, his executor, brought an action upon this special promise, which was merely *verbal*, and not reduced into writing. The case was twice argued at the bar; and, after time taken by the Court to consider it, *Lee* Ch. J. delivered the opinion of the Court as follows: "The single question is, whether this promise which is confessed by the demurrer not to have been in writing, is within the statute of frauds and perjuries? that is to say, whether it be a promise for the debt, default, or miscarriage of another person? And we are all of opinion that it is not, but that it is an original promise, sufficient to found an *assumpsit* upon against *Nash*, and is a lien upon *Nash*, and upon him only. *Johnson* was not a debtor; the cause was not tried; he did not appear to be guilty of any default or miscarriage; there might have been a verdict for him if the cause had been tried, for any thing we can tell; he never was liable to the particular debt, damages, or costs. The true difference is between an *original* promise, and a *collateral* promise; the *first* is out of the statute, the *latter* is not, when it is to pay the debt of another which was already contracted."

2. OF THE CONSIDERATION MOVING TO THE PARTY PROMISING.] — If the consideration, upon which the promise is made, be moving to the party promising, in that case the promise is not within the statute:

(l) Per Curiam 6 Mod. 249. 12 Mod. 250.

(m) 5 Mod. 205. Comb. 362. S. C.

(n) 1 Wils. 305.

Thus, in the case of *Williams v. Leper*, (o) the facts were as follow : *Taylor*, a tenant of the plaintiff, being in arrear for rent, to the amount of 45*l.* for three-quarters of a year, and insolvent, conveyed all his effects for the benefit of his creditors. They employed *Leper*, the defendant, as a broker, to sell the effects, who accordingly advertised a sale. On the morning advertised for the sale, *Williams*, the landlord, came to distrain the goods in the house. *Leper* having notice of the plaintiff's intention to distrain them, promised to pay the arrear of rent, *if he would desist from distraining*. *Williams*, on the faith of this promise, accordingly desisted. At the trial, a verdict was found for the plaintiff for 45*l.* ; but a question was reserved for the opinion of the Court, whether or not this was such a special promise for the debt of another as was within the statute of frauds ? And after argument, Lord Mansfield Ch. J. said, " The case has nothing to do with the statute of frauds. The *res gesta* would entitle the plaintiff to his action against the defendant. The landlord had a legal pledge ; he entered to distrain ; he had the pledge in his custody. The defendant agreed, ' that the goods should be sold, and the plaintiff paid in the first place.' The goods were the fund : the question was not between *Taylor* and the plaintiff. The plaintiff had a lien on the goods. *Leper* was a trustee for all the creditors, and was obliged to pay the landlord, who had the prior lien : this has nothing to do with the statute of frauds." *Wilmot* and *Yates*, Justices, were of opinion, that this was an original promise ; and Mr. Just. *Aston* said, " He looked upon the goods to be the debtor ; and that *Leper* was not bound to pay the landlord more than the goods sold for, in case they had not sold for 45*l.* The goods were a fund between both ; and on that foot he concurred."

The principle upon which this case was determined was recognised in *Houlditch v. Milne*. (p) It was an action of *assumpsit* for the repair of carriages ; and the facts in support of it were, that certain carriages which belonged to Mr. *Copey* had been sent by the defendant to the plaintiff's to be repaired, but the orders concerning them were given by the defendant. One of the carriages had been brought by Mr. *Copey* himself, and paid for by him ; and the bill, which was the object of the action, contained a charge for repairs done to this carriage, and was made out in the name of *Copey*. When the carriages were repaired, the defendant sent an order to pack them up, and send them on board ship ; the plaintiff upon this sent to him to know who was to pay for them : the defendant said he had sent them, and he would pay for them. The carriages were afterwards packed up and sent on board ship, and the bill was made out and delivered to the defendant ; he desired time

(o) 3 Bur. 1886. 2 Wils. 308. S. C.
Vide *Castling v. Aubert*, post. 199. where
this case is recognised.

(p) 5 Esp. Rep. 86.

to look over it ; and when the plaintiff's clerk called a second time, he said the charges appeared very high ; but desired the clerk to call in a few days, and he would settle it. Not having done so, the plaintiff's attorney waited upon him, when the defendant said, that he had been told that the bill was a most exorbitant one, and a fit subject to refer. However, he said, he had money to pay it, though he did not say, whether it was his own or *Copey's*. Upon these facts it was contended, on behalf of the defendant, that this case was within the statute of frauds. But Lord *Eldon* Ch. J., before whom the cause was tried, said, " If a person obtained possession of a tenant's goods on which the landlord had a right to distrain for rent, and he promised to pay the rent, though it was clearly the debt of another, yet a note in writing was not necessary ; that such a case appeared to apply precisely to the one before him. The plaintiff had to a certain extent a lien upon the carriages, which he parted with on the defendant's promise to pay. His lordship therefore was of opinion, that that circumstance took the case out of the statute, and consequently that the defendant was liable for the amount of the bill.

So, in the case of *Castling v. Aubert*, (q) where the following case was stated for the opinion of the Court of *King's Bench* : The plaintiff was employed by one *E. P. Grayson* as his general agent ; and, as an insurance broker, had effected for his use certain policies of assurance mentioned in the declaration, of the value of 3000*l.* ; that the plaintiff was under acceptances for *Grayson*, for bills drawn by *Grayson* for his own accommodation ; and that the plaintiff had a lien on the said policies to indemnify himself against his said acceptances. That a loss having happened on the policies of insurance, which the underwriters had agreed to pay, but which *Grayson* could not receive without having the policies to produce, the plaintiff was applied to, to give them up for that purpose to the defendant, into whose hands *Grayson* had at that time transferred the management of his insurance concerns. That some of the plaintiff's said acceptances for the use of *Grayson* being then outstanding and unpaid, and particularly the bill for 181*l.* 1*s.* mentioned in the declaration then in the hands of one *Cator*, upon which writs had been sued out (though not then executed) against *Grayson* as the drawer, and the plaintiff as acceptor ; the plaintiff refused to deliver up the policies of assurance, they being the only securities he had against his said acceptances, without an indemnity ; and that thereupon a meeting was held between the plaintiff, and defendant, and *Grayson*, at which it was verbally agreed between the parties, that the defendant should pay into the hands of a banker 712*l.* 13*s.* 6*d.*, to answer in part certain other acceptances of the plaintiff's, exclusive of the bill for 181*l.* 1*s.* ;

(q) 2 East Rep. 325.

and that the plaintiff should provide 24*l.* 14*s.* 6*d.* towards paying one of his acceptances for 350*l.*; and that the defendant should pay the bill of 181*l.* 1*s.* and the costs of the action which had been brought thereon against *Grayson*, amounting together to 202*l.*; and that thereupon the said policies should be delivered up to the defendant. That in pursuance of this agreement, the defendant paid into the banker's hands 712*l.* 13*s.* 6*d.*, and the plaintiff delivered up the policies to the defendant. That the defendant received from the underwriters the amount of other subscriptions on the policies so delivered up to him by the plaintiff. That the defendant was afterwards called upon by the attorney of *Cator* to pay the said 202*l.* for the debt and costs on the bill in *Cator's* hands, but refused to do so; nor had he paid it at the time this action was commenced; and that in consequence of such refusal the plaintiff was arrested at the suit of *Cator*, as acceptor of the said bill of exchange, and sustained damages thereby to the amount found by the jury, viz. 25*l.* The question for the opinion of the Court was, whether the promise of the defendant to pay the said 202*l.* due from *Grayson* for the said debt and costs, on having the said policies of insurance delivered to him, was void under the statute of frauds; or whether he were liable by reason of the plaintiff's parting with the possession of those policies upon which the plaintiff had a lien, and which were so deposited with the defendant? The Court were of opinion, that this was not a promise for the debt or default of another within the statute of frauds, but an *original* undertaking. And Lord *Ellenborough* Ch. J. said, "I am clearly of opinion, that this is neither an undertaking for the debt, default or miscarriage of another within the statute. It could not be for the *debt*, but rather for the credit of another; for when the promise was made, no debt was incurred from *Grayson* to the plaintiff; therefore, if at all within the statute, it must be for the default or miscarriage of another. It is quite beside the mischief provided against by the statute; which was, that persons should not, by their own unvouched undertaking, without writing, charge themselves for the debt, default, or miscarriage of another. In the case of a bill of exchange for which several persons are liable, if it be agreed to be taken up and paid by one, eventually others may be discharged; and the same objection might be made there: but the moving consideration is the discharge of the party himself, and not of the rest, though that also ensues. I agree with the decision in *Williams v. Leper* (r) to the full extent of it: I agree with those of the judges who thought the case not within the statute of frauds at all.

So, in the case of *Anstey v. Marden*, (s) which was an action of *assumpsit*; and upon the trial, it appeared in evidence, that the defendant

(r) *Ante*, 197.

(s) 1 New Rep. C. B. 124.

being in distressed circumstances, the plaintiff and three other creditors of the defendant met, and finding that he could only pay 7s. 6d. in the pound, they came to an agreement to accept from one *T. Weston*, the defendant's father-in-law, 10s. in the pound in satisfaction of the debts due to them from the defendant, and to assign those debts to the said *T. Weston*; and an agreement was accordingly prepared for that purpose.—The three other creditors signed this agreement, and received their respective sums of money, to the amount of 10s. in the pound from *T. Weston*, and the plaintiff at one time authorised *Greenwood* (one of the three creditors who signed) to sign for him when he signed for himself; but *Greenwood* having omitted so to do, the plaintiff revoked his authority, and refused to execute the agreement, or accept the 10s. in the pound on his debt. On behalf of the plaintiff it was objected, that *Weston's* undertaking to pay 10s. in the pound in discharge of the defendant's debt was void by the statute of frauds, no agreement by which *Weston* could be charged having been signed by him, and therefore the plaintiff's undertaking to accept 10s. in the pound was *nudum pactum*. But the Chief Justice ruled that the undertaking of *Weston* was not within the statute of frauds. And the Court of Common Pleas afterwards, upon a rule to shew cause why there should not be a new trial, confirmed his Lordship's opinion, and determined, that this agreement was not within the statute; it not being a collateral promise to pay the debt of another, but an *original contract to purchase the debts*.

3. OF A PROMISE TO PAY THE DEBT OF A THIRD PERSON IN CONSIDERATION OF FORBEARANCE TO SUE THE DEBTOR, &c.] It is now settled, that a mere promise to pay the debt of a third person in *consideration of forbearance* only, is within the statute, and such promise must be in writing. This point was raised in the case of *Fish v. Hutchinson* (t), which was an action of *assumpsit*; the plaintiff declared that whereas one *Vickars* was indebted to him in a certain sum of money, and had commenced an action for the same; that the defendant in consideration that the plaintiff would stay his action against *Vickars* promised to pay plaintiff the money owing to him by *Vickars*. It was objected, that this promise being by parol was within the statute. The counsel for the plaintiff insisted that this was an original contract between the plaintiff and defendant, and therefore not within the statute; and cited *Read v. Nash* (u) as in point. But the Court said, "This case is very clearly within the statute; for here is a debt of another person still subsisting, and a promise to pay it: and it is not like the case of *Read v. Nash*, for that was an action of assault and battery brought by the plaintiff's testator against one *Johnson*; the cause was at issue, the record of *nisi prius* entered, and just coming on to be tried, when

(t) 2 Wils. 94. Stra. 873. S.P.

(u) Ante, 196.

the defendant *Nash*, being present in court, in consideration that plaintiff's testator would not proceed to try his cause, but would withdraw his record, promised to pay him 50*l.* and costs to be taxed in that suit; so in that case there was no debt of another, it being an action of battery, and it could not be known before trial whether the plaintiff would recover any damages or not; but in the present case here is a debt of *another* still subsisting, and a promise to pay it."

So, a promise by the indorser of a dishonoured note, to indemnify the holder, if he will proceed to enforce the payment against the other parties thereon, must be in writing, otherwise it is void. Thus, in the case of *Winckworth v. Mills* (v), which was an action of *assumpsit*. The plaintiff was indorsee of a promissory-note made by one *Sharp* in favour of *Taylor* and Son, for 60*l.*, payable three months after date, and indorsed by them to the defendant, and by him indorsed to the plaintiff. When the note became due, it was dishonoured by the maker, upon which the defendant, having notice thereof, came to the plaintiff and promised him that if he would endeavour to recover the amount of it from the maker, or *Taylor* and Son, that he would indemnify him. *Sharp* was insolvent; and the plaintiff thereupon sued *Taylor* and Son to judgment, but could not obtain from them more than 30*l.*, and therefore brought his action against the defendant for the remainder of the note, and also the costs and expences. Lord *Kenyon* Ch. J., before whom the cause was tried, enquired if there had been any note in writing of the promise to indemnify; the counsel for the plaintiff answered in the negative; but contended that it was not necessary, as the defendant was himself a party to the note, and to be benefited by the proceedings against *Taylor* and Son. His Lordship, however, ruled, that this was a promise for the debt and default of another, and not being in writing, was void under the statute of frauds: and the plaintiff could only recover the remainder of the sum due upon the note, without the costs and expences of the action against *Taylor* and Son.

So, a *parol* promise to pay the debt of another, and also to do some other act, is void by the statute, *the contract being entire*. This was settled in the case of *Chater v. Beckett* (w), which was an action of *assumpsit* on a special agreement, and for money paid, tried before Lord *Kenyon*. At the trial, the plaintiff's counsel stated, that the facts of the case were these: that the plaintiff, who had struck a docket against *J. Harris*, was induced not to prosecute the commission of bankrupt, but to sue him at law for the recovery of his debt, and having sued out a writ against him, some of *Harris*'s creditors were anxious to take a composition for their debts, provided all of them would agree to it; and to effect this scheme, the plaintiff called several meetings of *Harris*'s creditors, at the

(v) 2 Esp. Rep. 484.

(w) 7 Term Rep. 201. See also *Coke*

v. Tombs, Anstr. 420. *Lea v. Barber*,
1b. 425.

last of which a composition of 10s. in the pound was proposed, which all the creditors, except the plaintiff, consented to take : but as the plaintiff had been put to great expences in striking the docket against *Harris*, suing out a writ, and calling the creditors together, he would not agree to take that composition unless those expences were also paid, in consequence of which the defendant promised to pay those expences, and to accept bills drawn by the plaintiff on him to the amount of the composition. The plaintiff accordingly drew bills on the defendant to that amount, which the latter accepted and paid : but the defendant refusing to pay the plaintiff's expences, amounting to 20*l.* 13*s.*, the plaintiff paid them to the attorney, and brought this action to recover the same from the defendant on his undertaking. But this undertaking not being in writing, Lord *Kenyon* was of opinion that the case came within the statute of frauds, and nonsuited the plaintiff, referring to the case of *Read v. Nash*.^(a) And upon a rule obtained for setting aside the nonsuit, the Court, after argument, were of opinion that the case was within the statute, and discharged the rule.

Upon the latter branch of the fourth section of this statute, as to the signature of the party, or of some other person thereunto by him lawfully authorised, it is now settled, that such agent need not be authorised in writing ; and the power given to an agent to sign a guarantee may be established by general proof of his having signed former guarantees which his principal has paid. Thus, in the case of *Watkins v. Vince*^(b), which was an action upon a guarantee, and at the trial before Lord *Ellenborough* Ch. J. it was proved, that the son of the defendant, a lad of about 16 years of age, had signed, for his father guarantees in three or four instances, and to have accepted bills for him : and upon such evidence his Lordship held, that he was a sufficient agent to sign a memorandum of guarantee.

4. THE PROMISE MUST NOT ONLY BE MADE UPON A GOOD CONSIDERATION, BUT SUCH CONSIDERATION MUST BE SET FORTH IN THE AGREEMENT.] Thus, in the case of *Wain and another v. Warlters* ^(c), the plaintiffs declared that, at the time of making the promise after mentioned, they were the indorsees and holders of a bill of exchange, dated the 14th of *February* 1803, drawn by one *W. Gore* upon and accepted by one *J. Hall*, whereby *Gore* requested *Hall*, seventy days after date, to pay to his, *Gore's* order, 56*l.* 16*s.* 6*d.* ; which bill of exchange *Gore* had before then indorsed to the plaintiffs, and which sum in the bill mentioned, was at the time of making the promise by the defendant due and unpaid. And thereupon the plaintiffs, before and at the time of making the said promise by the defendant, had retained one *A.* as their attorney, to sue *Gore* and *Hall* respectively for the recovery of

(a) *Ante*, 196.

(b) 2 *Stark. Rep.* 368.

(c) 5 *East Rep.* 10.

the said sum then due, &c. whereof the defendant, at the time of his promise, &c. had notice. And thereupon, on the 30th of *April* 1803, at, &c. in *consideration of the premises and that the plaintiffs*, at the instance of the defendants, *would forbear* to proceed for the recovery of the said 56*l.* 16*s.* 6*d.*, he, the defendant, undertook and promised the plaintiffs to pay them by half-past four o'clock on that day, 56*l.* and the *expences* which had *then been incurred* by them *on the said bill*. The plaintiffs then averred that they did, within a reasonable time after the defendant's promise, stay all proceedings for the recovery of the said debt, and have hitherto forbore to proceed for the recovery thereof; and that the expences by them incurred on the said bill at the time of making the promise by the defendant, and in respect of their having so retained the said A. and on account of his having, before the defendant's said promise, drawn and engrossed certain writs called *special capias*, against *Gore* and *Hall* respectively on the said bill, amounted to 20*l.* of which the defendant had notice; yet the defendant did not at half-past four o'clock on that day, &c., nor at any time before or since, pay the said sum of 56*l.* and the said expences incurred, &c. In support of the undertaking laid in the declaration, the plaintiffs, at the trial, at *Guildhall*, produced the written engagement signed by the defendant, which was in these words: "Messrs. *Wain* and Co. I will engage to pay you by half-past four this day, fifty-six pounds and expences on bill that amount on *Hall*; (signed) *Jno. Warlters*, (and dated) *April* 30th, 1803." It was objected, on the part of the defendant, that though the promise, which was to pay the debt of another, *were in writing*, as required by the statute of frauds, yet that it did not express the *consideration* of the defendant's promise, which was also required by the statute to be in writing; and that this omission could not be supplied by parol evidence, (which the plaintiffs proposed to call in order to explain the occasion and consideration of giving the note); and that for want of such consideration appearing upon the face of the written memorandum it stood simply as an engagement to pay the debt of another without any consideration, and was therefore *nudum pactum*, and void. Lord *Ellenborough* Ch. J., before whom the cause was tried, being of this opinion, nonsuited the plaintiff. And upon a motion for a rule to set aside this nonsuit, the Court determined that the consideration ought to have been stated in the agreement; and therefore discharged the rule. His Lordship in delivering his opinion in Court said, "In all cases where by long habitual construction the words of a statute have not received a peculiar interpretation, such as they will allow of, I am always inclined to give to them their natural ordinary signification. The clause in question in the statute of frauds has the word agreement ("unless the agreement upon which the action is brought, or some memorandum or note thereof shall be in writing," &c.) And the question is, whether

that word is to be understood in the loose incorrect sense in which it may sometimes be used, as synonymous to *promise*, or undertaking, or in its more proper and correct sense, as signifying a mutual contract on consideration between two or more parties? The latter appears to me to be the legal construction of the word, to which we are bound to give its proper effect; the more so when it is considered by whom that statute is said to have been drawn, by Lord *Hale*, one of the greatest judges who ever sat in *Westminster Hall*, who was as competent to express as he was able to conceive the provisions best calculated for carrying into effect the purposes of that law. The person to be charged for the debt of another is to be charged, in the form of the proceeding against him, upon his special *promise*; but without a legal consideration to sustain it, that promise would be *nudum pactum* as to him. The statute never meant to enforce any promise which was before invalid, merely because it was put in writing. The obligatory part is indeed the *promise*, which will account for the word *promise* being used in the first part of the clause, but still, in order to charge the party making it, the statute proceeds to require that the *agreement*, by which must be understood *the agreement in respect of which the promise was made*, must be reduced into writing. And, indeed, it seems necessary for effectuating the object of the statute that the consideration should be set down in writing as well as the promise; for otherwise the consideration might be illegal, or the promise might have been made upon a condition precedent, which the party charged may not afterwards be able to prove, the omission of which would materially vary the promise, by turning that into an absolute promise which was only a conditional one: and then it would rest altogether on the conscience of the witness to assign another consideration in the one case, or to drop the condition in the other; and thus to introduce the very frauds and perjuries which it was the object of the act to exclude, by requiring that the *agreement* should be reduced into writing, by which the consideration, as well as the promise, would be rendered certain. The authorities referred to by *Comyns* all show that the word *agreement* is not satisfied unless there be a consideration, which consideration forming part of the agreement ought therefore to have been shown; and the promise is not binding by the statute unless the consideration, which forms part of the agreement, be also stated in writing. Without this, we shall leave the witness whose memory or conscience is to be refreshed to supply a consideration more easy of proof, or more capable of sustaining the promise declared on. Finding therefore the word *agreement* in the statute, which appears to be most apt and proper to express that which the policy of the law seems to require, and finding no case in which the proper meaning of it has been relaxed, the best construction which we can make of the clause is to give its proper and legal meaning to every word of it."

This decision of the Court of King's Bench was frequently noticed in subsequent cases (*d*), as to the construction put upon the fourth clause of the statute of frauds; and it was thought by some very eminent and learned judges, that that decision was at variance with former determinations, and contrary to the generally received opinion in *Westminster Hall*. This point, however, has again been recently brought before the same Court, in the case of *Saunders v. Wakefield* (*e*), and, after much argument, in which several of the authorities just referred to were cited, the same judgment was given as in *Wain & Warlters'* case: and it should be observed, that the learned judges who formed the court when this last decision took place, were all different from those who had given judgment in *Wain & Warlters'* case. And Mr. Just. *Holroyd*, in delivering his opinion in that case, says, "Whether we consider the general object of the statute, or the particular object of the fourth clause, it seems to me to be necessary, that the consideration for the promise should be stated in writing. The consideration is the very ground of the action, and without it the action will not lie. In the present case, that which is reduced into writing affords of itself no ground of action. The general object of the statute was, to take away the temptation to commit fraud by perjury in important matters, by making it requisite in such cases for the parties to reduce the circumstances to writing. The particular object of the fourth clause was, to prevent any action being brought in certain cases, unless there was a memorandum in writing. The object of both was, that the ground and foundation of the action should be in writing, and should not depend on parol testimony. Unless, therefore, what is sufficient to maintain the action be in writing, no action can be supported. If we take the word "agreement," used in the fourth section in its strict sense, it would seem to imply, that the whole of that which is agreed between the parties should be in writing, and the other cases mentioned in the clause support such a construction. For upon an agreement upon consideration of marriage, or a contract for the sale of lands, it is quite clear, that the consideration must be stated in writing. But whether we construe the word in its strict sense or not, still, inasmuch as without a consideration there can be no ground of action, it seems to me, that, upon this clause, the consideration must be stated in writing. In the present case, that which is reduced into writing, is merely an engagement to pay the bill. Now, unless there be a consideration for that, no action lies upon such a promise. If a consideration is to be introduced, it may be either past or future, and must be proved by parol evidence. If that were allowed, all the danger

(*d*) Vide *Ex parte Minet*, 14 Ves. 190. *Ex parte Gardom*, 15 Ves. 286. *Morris v. Stacy*, Holt N. P. 154.

(*e*) 4 Barn. & Ald. 595. And see 3 Brod. & Bing. 14, 211. 8 Taunt. 679. 1 Bing. Rep. 216.

which the statute of frauds was intended to prevent, would be again introduced. I am therefore of opinion, that there must be judgment for the defendant."

There is however a material distinction between the seventeenth clause of this statute, which relates to the sale of goods, and the fourth clause relating to the payment of a debt of a third person: and this distinction was settled very recently after the determination of *Wain v. Warlters*, in the case of *Egerton v. Matthews* (*f*), which was an action on the case against the defendants for not accepting and paying for certain goods, which they had contracted to purchase by the following memorandum in writing: "We agree to give Mr. *Egerton* 19*d.* per lb. for 30 bales of Smyrna cotton, customary allowance, cash 3 *per cent.* as soon as our certificate is complete, (Signed, *Matthews* and *Turnbull*, and dated 2*d* September, 1823." The Court, on referring to these two clauses of the statute, decided that this was a sufficient memorandum within the words of the seventeenth clause; and Lord *Ellenborough* Ch. J. said, "The words of this clause were satisfied if there were some note or memorandum in writing of the bargain, signed by the parties, to be charged by such contract. And this was a memorandum of the bargain, or at least of so much of it as was sufficient to bind *the parties to be charged therewith*, and whose signatures to it is all that the statute requires." And *Laurence* Just. said, "The case of *Wain v. Warlters* proceeded on this, that in order to charge one man with the debt of another, the *agreement* must be in writing; which word *agreement* we considered as properly including the *consideration* moving to, as well as the *promise* by the party to be so charged; and that the statute meant to require that the whole agreement, including both, should be in writing."

So, in the case of *Stadt v. Lill* (*g*), which was an action on the case for the breach of a guarantee in not paying the value of goods delivered by the plaintiff to one *Nichols*. The defendant gave a written guarantee signed by him in this form: "I guaranty the payment of any goods which *J. Stadt* delivers to *J. Nichols*." It was objected at the trial, before Lord *Ellenborough* Ch. J., upon the authority of the case *Wain v. Warlters*, that this guarantee was void, because there was no consideration stated for the promise. But his Lordship was of opinion, that the stipulated delivery of the goods to *Nichols* was a consideration appearing on the face of the writing, and when the delivery took place, the consideration attached: and he directed the jury accordingly, who found a verdict for the plaintiff; but he gave leave to the defendant to move to enter a nonsuit if this direction were wrong. A motion for this purpose was accordingly made. But the Court were satisfied that

(*f*) 6 East Rep. 307.

See also *Russell v. Moseley*, 3 Brod. &

(*g*) 9 East Rep. 348. and 1 Campb. 242. Bing. 211.

the direction was right, for the reason before given by his Lordship, and discharged the rule.

2. OF THE CONSTRUCTION OF A GUARANTEE, AND ITS EXTENT AND CONTINUANCE: AND OF ITS DURATION WHEN GIVEN TO A PARTNERSHIP FIRM, OR TO ONE WHO AFTERWARDS TAKES A PARTNER.

1. OF THE CONSTRUCTION OF A GUARANTEE.] The same rules of construction which apply to contracts and promises in general, will equally apply to a guarantee; and, like other instruments, must be construed according to the plain, natural import of its terms: though it has been said (*h*), that as against a surety, a contract cannot be carried beyond the strict letter of it. And, therefore, where a party writes to a trader, respecting the honour and probity of a customer, and stating that he has no objection to guaranty the trader against loss from his giving him credit; such offer does not of itself amount to an absolute guarantee, but as a mere overture, unless the trader answers it, and apprises the party that he will accept it as such, and supply the customer with the goods accordingly; more particularly if the trader has a guarantee from another house at the same time. This was determined in the case of *M'Iver v. Richardson* (*i*), which was an action of assumpsit upon a promise to guaranty the plaintiffs the payment of the rigging, stores, &c. of a ship furnished to *Anderson and Co. of Quebec*, to the amount of 2091*l.* 11*s.* 7*d.* Prior to their making the supply, *Anderson and Co.* had applied to the plaintiffs, but they declined to act upon *Anderson and Co.*'s credit alone; they were, therefore, referred to the defendant, who wrote to them the following paper, addressed to the plaintiffs: "Gentlemen, As I understand Messrs. *David Anderson and Co.* have given you an order for rigging, &c., which will amount to about four thousand pounds, I can assure you from what I know of *D. A.*'s honour and probity, you will be perfectly safe in crediting him to that amount; indeed, I have no objection to guaranty you against any loss from giving them this credit. *John Richardson, Liverpool, March 12, 1811.*" This paper was communicated by *Anderson* to the plaintiffs, who were not satisfied, but required, in addition, the security of another person, and *Anderson* applied to *Pagett and Co.*, who gave a separate guarantee, which the plaintiffs accepted. On the 13th of *April 1811*, *Anderson and Co.* wrote from *London* to the plaintiffs in *Liverpool*, inclosing the paper signed by the defendant, and also that signed by *Pagett and Co.*, which they stated to be a letter from the defendant, and one from *Pagett and Co.*, guarantying the payment of rigging and sails, &c. and requested an order for the delivery of the

(*h*) Per *Buller* Just., 2 T.R. 370. and see 2 Taunt. 206. 1 New Rep. 41.

(*i*) 1 Maule & Sel. 557.

goods at *Quebec*. The plaintiffs having received these two papers, they and the other tradesmen drew bills of exchange for the respective amounts of their demands on *Anderson* and Co., dated the 1st of *April* 1811, payable 12 months after date, which *Anderson* accepted; and the necessary orders for the delivery of the goods were thereupon given by the plaintiffs to *Anderson* and Co., which were accordingly complied with. None of these facts were communicated to the defendant, nor had he any knowledge of any part of the transactions after he had signed the above paper till applied to as after mentioned. The credit for goods of this description, when sold in *Liverpool*, is very various; for cordage it is often twelve months, and for the other articles three or six months. In *January* 1812, before the bills became due, *Anderson* and Co. failed, and the bills were dishonored, and notice of the dishonor was given to the defendant. The plaintiffs then applied to the defendant to make good to them the amount, which he refused; and thereupon the present action was brought. The Court were of opinion, that this was not an absolute guarantee, but only an overture or offer to guaranty. And Lord *Ellenborough* Ch. J., in delivering the judgment of the Court said, "The question is, whether the paper imports to be a perfect and conclusive guarantee, or only to a proposition tending to a guarantee. We do not know on what kind of previous application the defendant signed it, nor is there any subsequent circumstance stated from which it can be collected. The paper therefore must be construed according to the plain natural import of its terms. The import is, that the party signing it, understood that *Anderson* and Co. had given an order for goods to about 4000*l.*; that this order remained unexecuted; and then, as if a question had been put to the defendant respecting the honour and probity of *Anderson* and Co., the defendant says, "I can assure you, from what I know of *Anderson*, you will be perfectly safe in crediting them to that amount;" and then he adds, "Indeed I have no objection to guaranty you against any loss from giving them this credit;" which words import, that if application were made he would guaranty; but no such subsequent application was made. Indeed it appears that a guarantee was obtained from another house. A considerable period elapsed, and it was not made known to the defendant until the failure of *Anderson* and Co. that his paper had ever been communicated to the plaintiffs; considering this as a mere overture to guaranty, it appears to us that the defendant ought to have had notice that it was so regarded, and meant to be accepted; or that there should have been a subsequent consent on his part to convert it into a conclusive guarantee."

So, in *Symmons v. Want*, (*k*) which was an action upon a guarantee;

(*k*) 2 Stark. 371. See also *Clinan v. Cooke*, 1 Scho. & Lef. 22.

and in support of it, the plaintiff gave in evidence a letter in the handwriting of the defendant, but without date, in which the letter states, "I have no objection to guaranty the payment of the rent, as far as that of each quarter, during Mr. *T. Want's* continuance in possession." This is not sufficient, without shewing that the plaintiff accepted the defendant's offer.

So, in *Phillips v. Bateman*, (l) where the defendant, on occasion of there being a great run upon the *Milford* banking-house of Messrs. *C. A. and T. Phillips*, went to the bank and told the owners of notes issued by the bank, who were waiting for payment, that he had come to a resolution to support the bank with 30,000*l.*, at which the holders then present were satisfied, and said they would take no more money than was necessary, and would keep the rest of their notes till they got again into currency; and afterwards the defendant signed the following written paper: "I do hereby undertake to be accountable for the payment of the notes issued by the *Milford* bank, at their said banking-house called the *Milford and Pembrokeshire* bank, as far as the sum of 30,000*l.* will extend to pay; which will be an additional security to the public to that amount to the estate and effects of *Charles Allen Phillips* and *Thomas Phillips*, esquires, partners in the said bank. (Signed) *Nathaniel Phillips*." The Court held, that though the bank afterwards stopped payment, yet the defendant was not liable upon this undertaking to an action by the individual holders, who had taken the notes after notice of such undertaking, and before the stoppage.

So, a guarantee or promise to be answerable for money or goods to be supplied to a third person, will not extend to a present existing debt, and the mere cancelling an old note of hand, and substituting a new one, will not satisfy the guarantee, which is prospective in its effect. (m) But a guarantee for the payment of goods, given on the 7th, will cover goods contracted for on the 6th, but not delivered till the 7th, and then supplied on the credit of the guarantee. Thus, in the case of *Simmons v. Keating*, (n) which was an action of *assumpsit* on the defendant's guarantee, which was contained in a letter written by the defendant to the plaintiffs, in which he engaged, that in consideration they would supply his niece, *Mary Crowling*, with such goods as she from time to time should wish to buy, he would guarantee to them the payment of any sum due to them on her account, not exceeding 50*l.* Credit to be given for six months, to commence from the next *January*. It appeared that *Mary Crowling* had applied to the plaintiffs on the 6th of *December* to supply her with goods which were selected by her, but which they refused to supply her with, unless she could procure a respectable reference, which should satisfy them as to her responsibility.

(l) 16 East Rep. 356.

(n) 2 Stark. 426

(m) *Glyn v. Hertel*, 2 Mo. 134. 3 Taunt. 208. 8 C.

After this (on the seventh) she obtained the guarantee in question ; and then the goods, which had been previously agreed upon, were sent to her. It appeared also, that a bill of parcels had been sent with these goods entitled in this way, To Messrs. *Simmons* and Co., at three and three months' credit. *Abbott* Ch. J. was of opinion, " that as the sale of the goods was not complete till the delivery, and the delivery was subsequent to the guarantee, and made upon the faith of it, the value of the goods was recoverable under the guarantee. The credit under the guarantee and bill of parcels were both six months."

A recital professing to state the guarantee between the parties does not necessarily confine the extent of the responsibility of the surety to the limits therein specified ; for where a new subject matter of guaranty is afterwards introduced into the writing, and the agreement expressly extends to it, the surety is liable to both subjects. But the rule is, that where the limit is definitively marked out in the recital, it is not to be extended by any subsequent general words. (o)

2. OF THE EXTENT AND CONTINUANCE OF A GUARANTEE.] The extent and continuance of a guarantee must depend entirely on the particular engagement entered into, and the circumstances and situation of the parties. Thus, in the case of *Mason v Prichard*, (p) the defendant engaged in writing to guaranty the plaintiff " for any goods he hath or may supply W. P. with, to the amount of 100*l*." And at the trial, it was proved, that at the time when the guarantee was given, goods had been supplied to W. P. to the amount of 66*l*., and another parcel was supplied afterwards, amounting together to 124*l*., all of which had been paid for ; and the sum in dispute was for a further supply of goods to W. P. And the question was, whether this was a continuing contract for guarantying the supply of goods at any times afterwards furnished, as long as the parties continued to deal together, or whether it were continued to the first hundred pounds worth of goods furnished ? A verdict was found for the plaintiff ; but it was afterwards moved to enter a nonsuit, on the ground that it was a limited and not a continuing guarantee. But the Court of King's Bench were of opinion, " that this was a continuing or standing guarantee to the extent of 100*l* which might at any time become due for the goods supplied until the credit was recalled. The words, they said, were to be taken as strongly against the party giving the guarantee as the sense of them would admit of ; and the meaning was that the defendant would be answerable, at all events, for goods supplied to his brother to the extent of 100*l* at any time ; but that he would not be answerable for more than that

(o) Per Lord *Ellenborough*. 2 Campb. 411. See also *Pearsall v. Summersett*, 4 Taunt. 593. Lord *Arlington v. Mer-ricke*, 2 Saund. 414. and note 5. (p) 12 East Rep. 227. 2 Campb. 436.

sum." So, in the case of *Merle v. Wells*, (q) which was an action of assumpsit upon a guarantee contained in a letter, in which the defendant stated, "that he had been applied to by his brother *William Wells*, to be bound to the plaintiffs for such debts as he might contract with them not exceeding 100*l.* for goods, and then added these words — 'I consider myself bound to you for any debt he may contract for his business as a jeweller, not exceeding 100*l.* after this date.'" The plaintiffs continued to supply the brother with goods in his business above twelve months afterwards to a considerable amount, during which time they several times balanced accounts with him, and he paid them above the sum of 100*l.* The question was, whether the defendant's guarantee was limited to the first 100*l.*, for which the plaintiffs gave credit to *W. Wells*, or extended to any sum of that amount which he should thereafter owe them for goods supplied to him in the business of a jeweller. Lord *Ellenborough* Ch. J. said, "I think the defendant was answerable for any debt not exceeding 100*l.*, which *W. Wells* might from time to time contract with the plaintiffs in the way of his business. The guarantee is not confined to one instance, but applies to debts successively renewed. If a party means to be surety only for a single dealing, he should take care to say so. By such an instrument as this, a continuing suretyship is created to the special amount."

A party under such a liability has no relief in equity; for in the case of *Shepherd v. Beechar*, (r) the plaintiff placed his son an apprentice for seven years with the defendant, and was bound in a bond of 1000*l.* penalty for his fidelity. In about three years after, the apprentice embezzled cash to the amount of 203*l.*, which the plaintiff paid, and wrote to the defendant, desiring that he would not in future trust the apprentice with any cash. The defendant, however, did trust him, and at the expiration of the apprenticeship, he was found to have embezzled 2,750*l.*, and an action was commenced upon the bond against the father, who brought this bill in equity to be relieved against it, partly upon the ground of the neglect in the master in trusting the apprentice after the warning given by the plaintiff. But the Lord Chancellor said, "The father continued bound, and ought not to have satisfied himself with sending the letter and taking no care of the matter, but should have endeavoured to have made some end of the matter and got up the bond. Wherefore he must continue liable to answer some embezzlements, unless there should appear fraud in the master."

But in the case of *Kirby v. the Duke of Marlborough* and others, (s) it was decided that a bond conditioned for the payment of all such

(q) 2 Campb. 413.
(r) 2 P. W. 288.

(s) 2 Maule & Sel. 18.

sum or sums not exceeding 3000*l.*, with lawful interest as should or might at any time or times be advanced and lent by the plaintiffs to C. or paid to his use by his order or direction, was only a guarantee for advances once made to the amount of 3000*l.*, and not a continuing guarantee for advances to be made at any time.

So, in the case of *Melville v. Hayden*, (t) where the plaintiff declared upon the following guarantee: "Memorandum, 23d September 1818, I engage to guaranty the payment of Mr. Amos Moulden to the extent of 60*l.* at quarterly account, bill two months, for goods to be purchased by him of William and David Melville." At the trial, it appeared that there had been a delivery of goods for three quarterly accounts, all of which had been satisfied by Moulden; the default was made by him in the fourth quarterly payment, for which the action was brought. It also appeared, that in the first quarter goods to the amount of 59*l.* 4*s.* had been furnished, and in the second and third quarters to a greater extent. The learned Chief Justice Abbott thought at the trial, that the guarantee was at an end before the goods were furnished for which the action was brought, and directed a nonsuit, giving to the plaintiff leave to move to enter a verdict for 60*l.*, in case the Court should be of a different opinion. And a motion was accordingly made: But, after argument, the Court determined, that the memorandum was not a continuing guarantee; and Bayley Just. said, "The words 'quarterly account' do not seem to me to vary the case; they only mean that at whatever time the goods might have been delivered, the account for them should be rendered quarterly. A party who takes a guarantee of this sort should carefully provide that these words in it are expressive of its being a guarantee for goods to be furnished by him from time to time. The words of the guarantee in the case of *Mason v. Pritchard*, (u) were very different; they were, 'for any goods he hath or may supply.'" So, that there the guarantee was applicable to any goods furnished at any time to the amount of 100*l.*, whatever intervening payments might have taken place. They were therefore equivalent to the words 'any goods furnished from time to time.' In this case, however, I think there was no continuing guarantee."

3. OF THE DURATION OF A GUARANTEE GIVEN TO A PARTNERSHIP FIRM, OR BY A PARTY WHO AFTERWARDS TAKES A PARTNER.] If A. become bound to B. under condition that C. shall truly account to B. for all sums of money received by C. for B.'s use, and C. afterwards with B.'s knowledge takes D. as his partner, the guarantee does not extend to sums of money received by C. for B.'s use, after the formation of the partnership. (x) So, a bond conditioned to repay to five

(t) 3 Barn. & Ald. 593.

(u) Ante 210.

(x) *Bellairs v. Ebbsworth*, 3 Campb.

53. See also *Ex parte Marsh*, 2 Rose Rep. 239. *Wright v. Russell*, 3 Wils. 530. *Barclay v. Lucas*, 1 T.R. 291. n.

persons all sums advanced by them or any of them, in their capacity of bankers, will not extend to sums advanced after the decease of one of the five by the four survivors, the four then acting as bankers. (y) So, a bond given to three partners, and afterwards one of them dies, and the survivors then take a new partner into the firm, the surety is discharged from all liabilities for money or goods supplied to the debtor after the death of the partner. (z)

3. OF PROMISES TO BE ANSWERABLE FOR THE DEBT OR DEFAULT OF ANOTHER, IN CONSIDERATION OF FORBEARANCE TO SUE, &c. OR OF DISCHARGING THE DEBTOR, OR OF GIVING UP SECURITIES, &c.

An action will lie upon a promise in writing to pay a sum of money in consideration of giving time, or forbearing to sue a third person for a precedent debt or other cause of action. (a) Thus, if A. is indebted to B. in 10*l.* and upon this C. promises that in consideration that he will forbear A. till such a day, and if A. does not pay him on that day, he himself will pay B. the 10*l.* on the same day, this is a valid promise, upon which B. may have an action against C.; for though A. had the whole day to pay it, and so it was impossible for C. to pay it the same day, if he did not pay it, yet the substance of the promise is to pay, and the time limited being impossible, is void, and then it ought to be paid on request. (b) So, where the defendant was indebted to the plaintiff in 10*l.* for so much money lent, and in consideration that the plaintiff would not sue him for the 10*l.*, he promised to deliver to the plaintiff ten quarters of barley upon request. The plaintiff showed that he did not sue, &c. and that on such a day he required the barley, but that the defendant refused to deliver it. In an action upon this *assumpsit*, it was adjudged for the plaintiff. (c) So, if A. be indebted to B. in 100*l.* and B. is about to commence a suit for the recovery thereof, but C. a stranger comes to him and says, that if he will forbear him, he himself will pay it: this is a good consideration for the promise, B. averring that he had abstained and forbore to sue A. *et adhuc* did abstain and forbear, though no certain time was appointed for the forbearance; for it seems a perpetual forbearance is intended, the which he hath performed. (d) So, if A. be indebted to B., and C. a stranger says to him, that if he will forbear him *per paululum temporis* that he himself will pay him; this is a good consideration for an *assumpsit*, averring a certain time of forbearance. (e)

(y) *Weston v. Barton*, 4 Taunt. 673. (c) 1 Vin. Abr. 322. pl. 1.
 (z) *Strange v. Lee*, 3 Term Rep. 484. (d) 1 Rol. Abr. 27. pl. 45. 1 Danv. Abr.
 (a) Com. Dig. tit. Action on Assumpsit. 55. pl. 45.
 B. 1. (e) 1 Rol. Abr. 27. pl. 46. 1 Danv.
 (b) 1 Rol. Abr. 15. pl. 6. 1 Bac. Abr. 55. pl. 46. But see 1 Danv. 51. pl. 25, 26.
 tit. Assumpsit. B. and Com. Dig. tit. Action on Assumpsit.
 B. 1. contra.

So, if A. is indebted to B. and B. causes him to be arrested, and while he is under the arrest, a stranger comes to B. and says, that if he will forbear A. *per paululum temporis* he will pay him, upon which B. suffers A. to go at large; this is a good consideration for the promise, though he arrests A. within an hour after; for the deliverance from the present danger is a good consideration. (f) So, in the case of *Cowlin v. Cook*, (g) the plaintiff declared that the defendant was bound to him in 100*l.* which he intended to sue him for, and the defendant in consideration that the plaintiff would defer the payment and not sue him upon that bond, promised that he would pay him. It was objected that the consideration was not good, for he might forbear and defer for a day only, &c. But the Court held it good; for the deferring shall be intended during all the life of the obligee; and that if he sues him sooner upon that bond, an action on the case lies; and so it was ruled in one *Barkenham's* case. But if it had been *Quod deferret per paululum temporis*, it had not been good without putting a certain time.

So, in the case of *Waters v. Glassop*, (h) the plaintiff declared that the defendant's son was indebted to him in a sum of money, and that he had a design to arrest him for it; that the defendant, in consideration that the plaintiff at the special instance and request of the defendant would forbear to arrest the defendant's son until after the 23d of *October*, the defendant assumed to pay to the plaintiff on or before the 23d of *October*, so much as the defendant's son should be indebted to the plaintiff upon the balance of the account to be stated between the defendant's son and the plaintiff; and the plaintiff averred that an account was stated of all debts, owing by the defendant's son, to the plaintiff, and upon that account the defendant's son was found indebted to the plaintiff in 20*l.* and avers, that he forbore to arrest the defendant's son, from the time of the promise *hucusque*: and that the defendant did not pay the 20*l.* &c. Upon the trial, a verdict was found for the plaintiff. But it was moved in arrest of judgment; that the consideration was not good; because since the plaintiff was to forbear until after the 23d of *October*, and the defendant to pay the money on or before, it might be, that after the defendant had paid the money, the plaintiff would not perform his part, but arrest the defendant's son before the time agreed by the promise. But the Court said, "The consideration is well enough, for the defendant has to the last instant of the 23d of *October* to pay the money, and the next instant for forbearance the plaintiff has performed his part, for he is not bound to forbear but only one instant after the 23d of *October*, and therefore it is well enough."

(f) 1 Rol. Abr. 27. pl. 47. 1 Danv. 55.
pl. 47.

(g) Noy 83. Latch. 151. S. C.

(h) 1 Ld. Raym. 557.

So, in *Harris v. Richards*, (i) which was an action of *assumpsit*; and the declaration stated, that whereas one *Bond* was bound to the plaintiff in an obligation of 40*l.* for the payment of 20*l.*; and whereas the defendant, was bound to one *Hodges* in an obligation of 100*l.* dated 5th February, 19 Jac. 1. for the payment of 55*l.* the 5th February following, and the said 20*l.* and 55*l.* being due and not paid, that the defendant, the 1st of February 1624, which was in the 22d year of *James* the first, in consideration the plaintiff would forbear the payment of the 20*l.* until 1627, and in consideration the plaintiff would compound with the said *Hodges* for the said 50*l.* and the interest then due, and deliver the said bonds into his hands, assumed to pay to him the said 20*l.* and the said 50*l.* and all the interest which he should pay or compound for; and alleges in fact, that he did forbear the said 20*l.*, and upon the 1st of March 1624 paid the said 50*l.* and 15*l.* for interest, and obtained the said bond into his hands, and that upon such a day, year, and place, he gave notice thereof to the defendant, and required of him payment thereof, according to his promise, who had not paid it, and therefore he brought this action. After verdict for the plaintiff, it was moved in arrest of judgment, that this action lies not; for it is no lawful consideration to pay interest. *Sed non allocatur*; "for it is to compound a forfeited bond, which is a good consideration; also it is no unlawful consideration to pay interest, not being more than is permitted." The second exception was, that there was not any consideration why the defendant should pay the 20*l.*, for he had not any benefit thereby. *Sed non allocatur*; "for it is a sufficient consideration that the plaintiff at his request would bear it."

So, in the case of *Davison v. Heslop*, (k) which was an action of *assumpsit*; and it was alleged that *Fenwicke* was indebted to the plaintiff for arrears of an annuity of 117*l.* and appointed the defendant then his receiver, to pay it out of the rents, due at *Martlemas* next ensuing; and that the plaintiff and defendant accounted, and thereupon it appeared; that 117*l.* was due to him. The defendant promised that if the plaintiff would forbear, he would pay it within a month after. For the plaintiff, it was moved in arrest of judgment, that it did not appear that the defendant received any rent at *Michaelmas*, and the appointment was to pay it only out of the rents due at *Martlemas*. But to this it was answered, that it should be so intended now, the defendant having promised to pay it upon forbearance; and of this opinion were the court, and gave judgment for the plaintiff.

So, if A. sues a writ of privilege (l) against B., and B. in consideration that A. will at the request of B. forbear further to prosecute the said writ, promises 50*l.* to A. this is a good promise, though it be not averred

(i) Cro. Car. 272.

(l) *Bedwell v. Cotton*, Hob. 216.

(k) 2 Lev. 20. Raym. 211. S. C.

1 Danv. 47. pl. 6.

that the plaintiff had any good cause of action ; for the promise implies a cause, inasmuch as B. desired a stay ; this also requires a loss of the writ, and loss of the suit. So, where a plaintiff sued out a *capias ad respondendum*, (m) and after the return thereof, the defendant, in consideration the plaintiff would forbear further prosecution, promised to pay, &c. The Court held this a good consideration ; and though the first return be past, yet an *alias* may be taken out ; and judgment was given for the plaintiff. So, in the case of *Jennings v. Harley*, (n) which was an action of *assumpsit* ; and the plaintiff declared that whereas one *Basset* was indebted unto him in 50*l.* and that he brought debt, and had judgment to recover, and thereupon sued out a *capias ad satisfaciendum*, and an *exigent* against *Basset*, who was thereupon outlawed, and that the plaintiff intended to sue a *capias utlagatum* ; that the defendant, in consideration the plaintiff would forbear to proceed upon the *capias utlagatum* which he had sued out, until Easter Term next following, promised that if *Basset* did not pay the debt, that he would pay it ; and alleged in fact a non-performance of the promise. The defendant pleaded *non assumpsit*, which was found against him ; and after a verdict for the plaintiff, it was moved in arrest of judgment, that the action lay not ; for this consideration is against law, and also void, because this process is at the queen's suit and not at the party's. But *Gawdy*, *Fenner*, and *Yelverton*, held that the consideration was good ; for it is the party's suit as well as the queen's ; for the party is the means to entitle the queen thereto, and the party hath the special carriage thereof ; and if the sheriff suffer the party arrested upon such a *capias utlagatum* to escape, it is an escape against the plaintiff. *Popham* *è contra* : " For the suit is merely now the queen's suit, and a means whereby the party may have his execution. For as the queen is entitled thereto by the party, so, after the outlawry, the party is thereto by the queen, and that issueth for the contempt to the queen. And if the party will not take it, the queen's attorney may sue it out ; and the queen is not of right bound to satisfy the party out of the goods which are seized by this writ, although she doth it out of grace many times. But a petition of right lieth not in such case : and although the plaintiff hath advantage thereof, in regard of the party who is taken thereby to be in execution (which is the reason that he may have debt upon the escape), yet he cannot stay the execution of this writ, so the consideration is void." But, notwithstanding, the other judges gave rule, that if other matter were not shown before such a day, judgment should be entered for the plaintiff, and that the defendant might bring his writ of error. And no cause was afterwards shown, &c.

So, if A. exhibits a bill in *Chancery* (o) against B. supposing thereby

(m) 2 Keh. 200. pl. 3. 1 Vin. Abr. 323. pl. 47.

(n) Cro. Eliz. 909. Yel. 19. S. C.

(o) 1 Danv. 46. pl. 5. Raym. 372.

that he had delivered 300*l.* to B., in trust, upon which B. in consideration that A. would end all suits against him in *Chancery*, promises to pay him 100*l.*; in this case though A. has remedy for it at *common law* by writ of *account*, yet this is a good consideration, so as to have an action upon the case upon the *assumpsit*, because the money was delivered in trust, which is proper for the *Chancery*, and the suit there is a matter of charge. So, if A. promises B. in consideration that he will not sue an attachment out of *Chancery* (p) upon a decree which is there against him, that then he will pay 20*l.* (it seems it is intended that the decree was at his suit) this is a good consideration to maintain an action upon the case, for hereby shall he avoid the imprisonment of his body, of which the *Chancery* had power for the contempt of the decree.

If an heir be bound by a bond of his ancestor, and has assets; and in consideration that the obligee will forbear to sue him, he promises to pay the money due thereon, an action of *assumpsit* will lie upon this promise: but if the heir is not bound by the bond, no action is maintainable. Thus, in the case of *Barber v. Fox*, (q) which was an action of *assumpsit*, and the declaration stated, that whereas one *Anthony Fox*, the father of the defendant by his writing obligatory became bound to the plaintiff in 9*l.* 12*s.* upon condition to pay him 51*l.* 16*s.* at a certain day past, which was not paid, and so the obligation became forfeited, and afterward *Anthony Fox*, the father, died, and the defendant was his son and heir; wherefore the plaintiff intended to sue the defendant as son and heir on the said bond; and the defendant having notice of it, in consideration that the plaintiff, at the special instance and request of the defendant, would forbear his intended suit against the defendant as son and heir on the said bond, undertook and promised the plaintiff to pay him the said 51*l.* 16*s.* on request; and the plaintiff averred forbearance, and yet the defendant had not paid the said money, although on such a day and year he was requested, &c. On *non assumpsit* pleaded, a verdict was found for the plaintiff. But it was afterwards moved in arrest of judgment, that there was no consideration; for it does not appear that the defendant was sueable upon this bond as son and heir, for it is not shown that *Anthony Fox*, the defendant's ancestor, whose son and heir he is, had bound himself and his heirs by the said bond; and if the heir is not bound expressly by name, he is not bound at all; and therefore here was no consideration to found this promise; wherefore judgment was staid until it should be moved on the other side. Afterwards *Saunders*, for the plaintiff, moved for judgment, and said, "That though the declaration would have been bad on demurrer, yet is now made good by the verdict; for the jury have found that the defendant was bound as heir in the said bond, for otherwise there was

(p) Cro. Eliz. 768. 1 Rol. Abr. 30. Y. (q) 2 Saund. 136.
pl. 1. 1 Danv. Abr. 55. pl. 43.

no consideration; and they ought to have found that the defendant did not undertake, &c. if there was no consideration, or otherwise they might be attainted for a false verdict; but they having found, that the defendant did undertake and promise as the plaintiff has declared, it ought of necessity now to be intended that *Anthony Fox* had bound himself and his heirs by the same bond." But the Court said, "Though they would intend a personal lien against an executor, if he has assets in his hands, though it be not averred, yet they will not intend a real lien against an heir; though he be bound by the bond of his ancestor, unless it is expressly alleged; and therefore they would not intend it here, though it be after verdict; wherefore judgment was arrested." The learned editor of *Saunders's Reports*, in a note upon this case, shows a clear distinction between the liability of an heir and an executor, upon a promise to pay the debt of the ancestor or testator; and he there brings together the different cases on this subject.

Upon the same principle that a promise, in consideration of forbearance to sue where there is no cause of action, is void, it has been determined, that where a married woman gave a promissory note as a *feme sole*, but after her husband's death promised to pay it in consideration of forbearance to sue, no action lies on such a promise; because the note being void, no cause of action existed against her at the time of making the promise. (r) So, if an infant enters into an obligation for a certain sum of money, and afterwards the obligee brings debt upon the obligation, and procures a *latitat* to arrest him, and the obligor being of full age, and having notice thereof, comes to the obligee, and says to him, that if he would not arrest him he would pay him the money, this is not any consideration to maintain an action, inasmuch as the infant might have avoided the obligation by plea. (s) Again, if an infant takes up certain commodities of a mercer in *London*, at a certain price, who afterwards, for non-payment of the money, threatens to sue him, and the mother of the infant promises to pay him if he will not sue her son, this is not any consideration to maintain the action, inasmuch as the infant was not by law chargeable for the money. (t) So, if A. be indebted to B. by bill, and B. is indebted to C., and B. in recompence of his debt due to C. assigns the bill of A. to him, and, before the day of payment of the money, A. comes to C. and promises him that if he will forbear him the payment of the money for a week, that then he will pay him; upon which C. forbears him; yet this is not any consideration to maintain an action upon this promise; because, notwithstanding the assignment of the bill, yet the property of the debt remained always in the

(r) 1 Stra. 94.

(s) 1 Rol. Abr. 18. l. 50. 1 Danv. 46. pl. 2. Cro. Eliz. 700. But see Dy. 272.

b. marg. Cro. Eliz. 127. 1 Leon. 110 contra.

(t) Danv. Abr. 46. pl. 1.

assignor. (u) But if A. is indebted to B. in 20*l.*, and thereupon B. makes a letter of attorney to C. to put him in suit, and to recover the debt to his own use, and to release it at his pleasure, and after A., in consideration that C. will forbear to sue him for a certain time, promises C. to pay the debt, this is a good consideration; for the forbearance of the suit whereof he had power is a meritorious consideration. (v)

So, an action of *assumpsit* will lie upon a promise to pay money in consideration of discharging a debt, or giving up securities. Thus, if A. be indebted to B. in 200*l.* and A. appoints B. to receive it from C., and for the better satisfaction of B., A. delivers certain bills of exchange to one D., the factor of B., for payment thereof; and upon this C. promises B. that in consideration that he would deliver to him the said bills of exchange, so delivered to D., the factor of B., that he would pay the said 200*l.* due by A. to B., this is a good promise, for the consideration is valuable; for though C. can do nothing with the bills, being a stranger to them, yet it may be some advantage to him to have the possession of them, at least it may be some prejudice to B., and therefore the consideration is good. (w) So, if L. be indebted to M., and L. delivers to M. certain goods to the value of 100*l.* as a pawn till he pays him the debt, and after J. S. comes to M. and promises to pay him the debt, in consideration that he will deliver to him the said pawn, upon which he delivers it to him accordingly; this is a good consideration to have an action upon the case against J. S. (x) And in the case of *Meredith v. Chute*, (y) which was an action of *assumpsit*, wherein the plaintiff declared that the defendant, in consideration that the plaintiff, at the special request of the defendant, *deliberasset* to the defendant *quandam notam*, by which one *Hurst* assumed to pay to the plaintiff a hundred guineas, assumed to pay to the plaintiff, &c. Upon *non assumpsit* pleaded, and a verdict for the plaintiff; it was moved in arrest of judgment, that the consideration of this promise was not good, since it did not appear that *Hurst* gave this note to the plaintiff upon any good consideration, and consequently the said note would be void, and then the delivery of the said note by the plaintiff to the defendant would be no prejudice to the plaintiff, nor advantage to the defendant. But it was resolved, (*per totam curiam*,) that this was a good consideration; for though no consideration was expressed in *Hurst's* note, yet the note being subscribed by *Hurst* was good evidence of debt due from *Hurst* to the plaintiff; and therefore the delivery of the evidence of his debt to the defendant at his request was a good consideration of the *assumpsit* of the defendant, upon which this action was brought. And

(u) 1 Vin. Abr. 304. pl. 12. See also 1 Saund. 210. n. 1. 1 Rol. Abr. 20. l. 20. 1 Ventr. 154. Hard. 74. Moor. 701. Cro. Eliz. 653. 1. Rol. Abr. 26. l. 30.

(v) 1 Rol. Abr. 20. pl. 11. 1 Vin. Abr. 304. pl. 11. 1 Saund. 210. n.

(w) 1 Danv. 50. pl. 21.

(x) 1 Danv. 47. pl. 8.

(y) 2 Lord Raym. 759. Salk. 25. 7 Mod. 12. S. C.

judgment was given for the plaintiff. Note, *Holt*, Ch. J. said: "That he was of opinion upon the trial, that it was not necessary for the plaintiff to prove upon what consideration the note of *Hurst* was given, the defendant having admitted it to have been given upon good consideration by his promise."

So, where a broker having a lien on certain policies of insurance effected for his principal, for whom he had given his acceptances, the defendant promised that he would provide for the payment of those acceptances as they became due, upon the plaintiffs giving up to him such policies, in order that he might collect for the principal the money due thereon from the underwriters: which was accordingly done, and the money was afterwards received by the defendant: it was held that this was not a promise for the debt or default of another within the statute of frauds; and that the plaintiff was entitled to recover upon the special promise or for money had and received. (z)

4. OF PROMISES TO PAY A PRECEDENT DEBT ON THE CREDITOR'S PROVING IT DUE UPON OATH, OR OF THE DEBTOR'S FAILING TO PROVE PAYMENT.

It happens sometimes when a debt is disputed, that the debtor, or a third person for him, agrees to pay it in consideration of the claimant's proving it to be due by the oath either of himself or witnesses before a magistrate, &c. Thus, in the case of *Amie v. Andrews*, (a) which was an action of *assumpsit*, wherein the plaintiff declared, that whereas the father of the defendant was indebted to him in 20*l.* for malt sold, and promised to pay it; that the defendant in consideration that the plaintiff would bring two witnesses before a justice of peace, who upon their oaths should depose, that the defendant's father was indebted to the plaintiff, and promised payment, assumed and promised to pay the money; then avers, that he did bring two witnesses, &c., who did swear, &c., the defendant pleaded *non assumpsit*; which being found against him, he moved in arrest of judgment, that the consideration was not lawful; because a justice of peace not having power to administer an oath in this case, it is an extrajudicial oath, and consequently unlawful. And *Vaughan* was of opinion, that every oath not legally administered and taken, is within the statute against profane swearing; and he said it would be of dangerous consequence to countenance these extrajudicial oaths, for that it would tend to the overthrowing of legal proofs. *Wyndham* and *Atkins* thought it was not a profane oath, nor within the statute of King *James*, because it tended

(z) *Castling v. Aubert*, ante 198. 325. Hard. 73.

(a) 1 Mod. 166. Cro. Eliz. 469; 470. 1 Danv. 45. pl. 24. S. P.

to the determining of a controversy. And accordingly the plaintiff had judgment.

Lord Chief Baron *Gilbert* in his Treatise on the Law of Evidence (b), in citing this case, says, "That the oath, though *extrajudicial*, and though the justices had no authority in the matter, was held good consideration, for the oath tending to a decision of the right, was not held to be contrary to the law of God, and therefore the parties might assume upon that consideration, but it is not such an oath as the law takes notice of to punish as perjury." And in the case of *Brett v. Prettyman* (c), which was an action of *assumpsit*, wherein the plaintiff declared, that the defendant owed him 15*l.*, and the defendant promised the plaintiff that if he would procure W. to take his oath in writing that such a sum was due, he would pay it; and the plaintiff avers that he did procure the said W. to take oath in writing before a master in Chancery, yet the defendant refused to pay. After several arguments, the Court adjudged this to be a good consideration, and gave judgment for the plaintiff; and the Court said, "Though the Master had no power, as judge, to administer the oath, yet it was an oath in conscience and within the meaning of the parties, and made solely for the deciding of a right.

So, where one affirmed that he had paid a debt which was demanded of him, and promised that if he could not prove it in a short time, he would pay the debt, this is a good consideration, and the words "short time" is to be intended a reasonable time to make his proof. (d)

5. OF PROMISES TO PAY MONEY, OR TO BE ANSWERABLE FOR THE DEBT, &c. OF ANOTHER, ON DELIVERING UP GOODS TAKEN IN EXECUTION, OR UNDER A DISTRESS FOR RENT, &c.

An action will lie on a promise to pay a precedent debt, in consideration that a sheriff's officer would restore goods taken in execution under a *feri facias* upon a judgment for the same debt. Thus, in *Love's* case (e), the sheriff takes goods in execution upon a *feri facias*; a stranger promises to the officer to pay him the debt, in consideration he would restore them. Upon demurrer this was argued, and compared to a consideration of suffering a prisoner to escape.* *Sed non allocatur*, "for by the *capias* he is to take and keep in *salva custodia*; and to give liberty is contrary to the writ, but that is now to raise the money, and the sheriff upon a *feri facias* may sell the goods, and this is no more in effect."

(b) 4th ed. p. 67.

(e) 1 Salk. 28. Vide *Pullen v. Stokes*,

(c) 1 Sid. 283. 2 Keb. 26. 44. Raym. 2 H. Black 312.

153. S. C. *Perkins v. Binke*, 2 Sid. 123.

* Vide post. 223.

S. P.

(d) 1 Danv. 52. pl. 30. 1 Vin. Abr. 309. pl. 30.

So, in the case of *Byne v. Playne* (f), where the plaintiff declared that he had recovered against W. 20*l.* in the court of S., and had a *levari facias* to the bailiff there, to make execution of the goods of W.; and whereas he was ready so to do, the defendant promised the plaintiff, that in consideration he would deliver the defendant the said goods, he, within fourteen days after *Michaelmas*, would pay the plaintiff the 20*l.* or otherwise re-deliver to the plaintiff the said goods, if, in the mean time, no other makes title to them, and proves them to be his own goods (and averred that none made title to them within that time). A special verdict found the recovery and *assumpsit*; but further, that before the recovery, W. was possessed of those goods, as his own proper goods, and by indenture sold them to R., his brother, for money, with a promise that W. notwithstanding should have the possession for four years, not yet expired, he to pay to R. 20*s.* a year; and that if the said W., at the end of the four years, should repay the said money, the sale should be void; and that the said R. made title to the said goods by virtue of that sale, this is a good promise, though W. had only a special property in these goods, and though they were not liable to the execution; for the plaintiff having the possession of the goods, his delivery of them to the defendant is a good consideration; and judgment was given for the plaintiff.

So, where a landlord is about to distrain the goods of his tenant for arrears of rent, and a third person promises, in consideration that the landlord would desist from distraining, he would pay the arrears, this is a good consideration, and the promise need not be in writing. Thus, in the case of *Williams v. Leper* (g), one *Taylor*, a tenant to the plaintiff, being three-quarters of a year in arrear for rent, (which amounted to 45*l.*) and being insolvent, conveyed to his creditors all his effects, for the benefit of his creditors. They employed *Leper*, the defendant, as a broker, to sell the effects; and accordingly he advertised a sale. On the morning of the sale, *Williams*, the landlord, came to distrain the goods in the house. *Leper* having notice of the plaintiff's intention to distrain them, promised to pay the said arrear of rent, if he would desist from distraining; and he did thereupon desist. The question was, whether the action could be maintained, the promise not being in writing.

The Court resolved, that the action was maintainable, the case not being within the statute of frauds and perjuries; and Lord *Mansfield* Ch. J. said, "The landlord had a legal pledge. He enters to distrain: he has the pledge in his custody. The defendant agrees, 'that the goods shall be sold, and the plaintiff paid in the first place.' The goods are the fund: the question is not between *Taylor* and the plaintiff.

(f) 1 Vin. Abr. 528. pl. 1. Cro. Eliz. 218. (g) 3 Bur. 1886. et vide ante, 197.
S. C.

The plaintiff had a lien upon the goods; *Leper* was a trustee for all the creditors, and was obliged to pay the landlord, who had the prior lien. This has nothing to do with the statute of frauds: it is rather a fraud in the defendant to detain the 45*l.* from the plaintiff, who had an original lien on the goods."

6. OF AGREEMENTS MADE WITH SHERIFFS' OFFICERS UPON THE ARREST OF A THIRD PERSON, EITHER TO PUT IN BAIL, OR TO PAY THE DEBT, &c. IN CONSIDERATION OF LETTING THE DEFENDANT OUT OF CUSTODY, &c.

A promise to a gaoler to pay the plaintiff's debt, in consideration that he, the gaoler, would suffer a defendant, who was in execution, to go at large, is void. Thus, in the case of *Martyn v. Blishman* (*h*), the case was as follows: Dr. *Holman* was in execution in *Plymouth* for 31*l.* at the suit of D., which was recovered there, before the mayor, &c. *Blishman* came to the gaoler, *Martyn*, and promised, in consideration he would set and suffer *Holman* to go at large, that the 31*l.* should be brought into court there by *Holman*, by such a day, to satisfy D., and that he would save *Martyn*, the gaoler, harmless from this enlargement. D. recovered against *Martyn* on the escape, and afterwards *Martyn* brought an action of *assumpsit* against *Blishman* on his promise, and it was adjudged against the plaintiff; for the consideration is against law, viz. to suffer one in execution to escape.

So, an agreement in writing to put in good bail for a person arrested on *mesne process* at the return of the writ, or surrender the body, or pay debt and costs, made by a third person with the bailiff of the sheriff, in consideration of his discharging the party arrested, is void by the statute 23 *Hen. 6. c. 9.* Thus, in the case of *Rogers v. Reeves* (*i*), which was an action of *assumpsit*, the facts were as follow: *Richard Stephens* was arrested by the plaintiff by virtue of a *latitat*, and a warrant thereon granted against him, at the suit of *J. Torriano*, and was discharged by the plaintiff on the following undertaking of the defendant:

"In the King's Bench. *J. Torriano*, gent. against *Richard Stephens*. Returnable on *Thursday* next, after eight days of *Saint Hilary*. Damages 40*l.*; bail for 35*l.* 7*s.* *Theakstone*, by *Evans*, attorney. I do hereby undertake to put in good bail, on or before the return, or surrender the body to Mr. *S. Rogers*, one of the officers to the sheriff of *Surrey*, or on default pay debt and costs. Dated 24th of *December* 1782. *S. Reeve*."

The plaintiff was afterwards compelled to pay to the said *J. Torriano* 44*l.* for debt and costs, by virtue of an attachment issued against the

(A) *Yelv.* 197.

(i) 1 *Term Rep.* 418.

sheriff: The Court determined that this undertaking was void by the stat. 23 Hen.6. c.9., and that no action could be maintained upon it.

7. WHAT ACTS OR CIRCUMSTANCES WILL DISCHARGE A GUARANTEE.

1. BY EXTENDING THE TIME OF CREDIT, OR BY TAKING FRESH SECURITIES, &c.] It is said to be a general rule, in cases of guarantee, that if a creditor gives time of payment to his debtor without the consent or knowledge of the surety, or otherwise varies the nature of the security, the surety will be discharged both in law and equity. (*k*) Thus, in the case of *Nisbit v. Smith* (*l*), which was a bill filed for an injunction to stay proceedings upon a bond, and it appeared that the plaintiff had joined one *Maynard* in a bond to the defendant for the debt of *Maynard*; *Nisbit* afterwards urged *Smith* to sue *Maynard* on the bond, which he did, and then consented to give him three years' time, without the knowledge of *Nisbit*. *Smith* afterwards sued *Nisbit* upon the bond, upon which he applied for an injunction upon the grounds above stated. The only point made in this case for the defendant was, that under the circumstances of the case *Nisbit* was to be considered as a principal rather than a surety. But Lord Chancellor *Thurlow* was of opinion that he was surety only, and decreed a perpetual injunction.

So, in the case of *Samuel v. Howarth* (*m*), a bill was filed in equity for relief, and also for an injunction against proceedings at law upon a guarantee, by which the defendant had engaged to be answerable to the plaintiff for the payment of any goods which he might supply to H. from April 1814 to April 1815. Goods were accordingly furnished by plaintiff during that period to H., at certain credits, to be then paid for in bills at three months, which were accordingly drawn upon H. by plaintiff, and accepted by him for the several amounts. These bills were afterwards renewed from time to time, and the fresh bills again renewed till June 1816, when H. became bankrupt, and notice of action given to defendant. It seems to have been admitted in the case, that H. could not have paid at any time; and the question was, whether defendant was discharged:

The Lord Chancellor said, "The rule is this, that if a creditor, without the consent of the surety, gives time to the principal debtor, by so doing he discharges the surety; that is, if time is given by virtue of positive contract between the creditor and principal — not where the creditor is

(*k*) Per Chambre Just. 3 Bos. & Pul. S. P., and see 3 Chitty on Commerce, 366. and per Gibbs, Ch. J. Holt's Rep. 326. N. P. 86.

(*l*) 2 Bro. Ch. Cas. 579., cited in Ex-parte Gifford, 6 Ves. jun. 809. See also 2 Ves. jun. 542. *Rees v. Berrington*, 3 Mo. 15. 8 Taunt. 679.

(*m*) 3 Merivale's Rep. 272. See also *Grant v. Campbell*, 6 Dow. 259. *Boehm v. Campbell*, 3 Mo. 15. 8 Taunt. 679.

merely inactive. And in the case put, the surety is held to be discharged for this reason, because the creditor by so giving time to the principal has put it out of the power of the surety to consider whether he will have recourse to his remedy against the principal or not, and because he, in fact, cannot have the same remedy against the principal as he would have had under the original contract. Now, in the present case, the creditor has been supplying goods to the principal debtor from time to time upon a certain credit, the extent of which not being expressly stipulated between the parties, I must take to be credit given according to the usual course of trade. The surety says, I will be answerable for the amount of such goods as you shall furnish during the period from the second day of *April* 1814, to the second day of *April* in the following year. It is impossible for me to hold, that this is an engagement by which he (the surety) has rendered himself liable for an indefinite time beyond the expiration of the period limited for the delivery of the goods. It cannot be supposed that the plaintiff meant he should continue liable after the 2d of *April* 1815, so long as the defendant chose to renew the bills of the principal debtor. You cannot contend in support of such an extravagant proposition. It has been truly stated that the renewal of these bills might have been for the benefit of the surety, but the law has said that the surety shall be the judge of that; and that he alone has the right to determine whether it is or is not for his benefit. The creditor has no right, it is against the faith of his contract to give time to the principal, even though manifestly for the benefit of the surety without the consent of the surety."

2. BY NOT COMPLYING WITH THE TERMS OF THE GUARANTEE.] The claim as against a surety is *strictissimi juris*, and it is incumbent on the party, to whom the guarantee is given, and who is enforcing it against the surety, to show, that he has strictly complied with the terms of the guarantee. And, therefore, if one engage to guaranty the debt of another provided eighteen months' credit be given, the creditor is not at liberty to vary it by giving twelve only; and after the expiration of six more to call upon the surety; but the surety in such case would be discharged (n). And though an undertaking to be answerable to a given amount, for any goods supplied by A. to B. is a continuing guarantee until revoked by the surety, yet if A. alters the credit on which he supplied the goods to B., the guarantee is discharged. This was determined in the case of *Bastow v. Bennett*, (o) which was an action upon the following guarantee, signed by the defendant: "*London, March 7. 1810, I hereby undertake and engage to be answerable to the extent of 300*l*. for any tallow or soap supplied by Mr. Bastow to Frame and Bennett, provided they shall neglect to pay in due time.*" The plaintiff immediately after

(n) Per Lord *Ellenborough*, in *Bacon v. Cheaney*, 1 Stark. 192.

(o) 3 Campb. 220.

supplied tallow and soap to *Frame* and *Bennett* to a large amount, at two months' credit. They regularly paid him above 300*l.*; but in the summer of 1810, they owed him a larger sum, and became considerably embarrassed in their circumstances. A meeting of their creditors was then held, at which it was agreed, that the creditors should continue to supply them with goods payable in ready money, but that the payments made should be applied to the old debts till they were satisfied. The plaintiff opened a new account with *Frame* and *Bennett* on this footing; and they afterwards became bankrupt, being indebted to him for tallow and soap in the sum of 54*l.* 10*s.* The balance of the first account, however, was nearly satisfied. Lord *Ellenborough* Ch. J. said, "The defendant here became answerable for any soap or tallow supplied by the plaintiff to *Frame* and *Bennett*. Without the word *any*, it might perhaps have been confined to one dealing to the amount of 300*l.*; but as it is actually worded, I am of opinion it remained in force while the parties continued to deal on the footing established when it was given. But I think the goods supplied after the new arrangement, were not within the scope of the guarantee; and that the defendant is only answerable for the unsatisfied balance of the old account."

So, if a promise is made to guaranty a bill of exchange for a certain sum, but the creditor takes from the debtor a bill for a much larger amount, it seems doubtful whether this does not wholly discharge the surety. (*p*)

3. OF THE DISCHARGE OF A GUARANTEE BY BANKRUPTCY.] A surety, under a guarantee on a bill of exchange, who is discharged by bankruptcy from his liability on the bill, is also discharged from the costs of an action against the principal. (*q*)

4. OF THE DISCHARGE OF A GUARANTEE BY A FRAUDULENT CONCEALMENT OF FACTS.] If a creditor fraudulently keeps back any material circumstances from the surety, it may, perhaps, be a ground for discharging the guarantee. But if A. become bound to B. for the honesty of C., who embezzles money, B. may maintain an action on the guarantee, though three years have elapsed without any notice having been given of the embezzlement by B. to A., at least if A. was acquainted with the circumstance from any other quarter, and B. does not appear to have concealed it from him, fraudulently or industriously, A. will not be discharged from his guarantee, though B. appear to have given credit to C. for the amount of the sum embezzled. (*r*)

5. OF LACHES IN NOT GIVING NOTICE, &c. TO THE SURETY OF THE DEFAULT MADE BY THE PRINCIPAL: AND OF THE SURETY'S GIVING UP A COUNTER SECURITY, HE NOT HAVING HEARD FROM THE HOLDER OF THE GUARANTEE, THOUGH WRITTEN TO ON THE SUBJECT.] The laches of obligees in a bond (conditioned for the principal obligor to account for

(*p*) See *Phillips v. Asling*, 2 Taunt. 211.

(*q*) *Bottomley v. Wilson*, 3 Stark. 148.

(*r*) *Peel v. Tutlock*, 1 Bos. & Pul. 419.

and pay over from time to time all such tolls as he should collect for the obligees) in not properly examining his accounts for eight or nine years, and not calling upon the principal for payment so soon as they might have done for sums in arrear or unaccounted for, is not an estoppel *at law* in an action against the sureties. (s) But where a party taking a security for the fidelity of another, covenants with the surety to act in a certain way for his protection, and omits so to do, such omission shall discharge the surety in equity; and although there be no covenant, yet it is the duty and implied undertaking of every man to use due care and diligence in the investigation of the accounts of his clerks and servants. Thus, in the case of *Montagu v. Tidcombe*, (t) the plaintiff's testator had put his son apprentice to the defendants, and given bond for his fidelity, and at the same time had taken a covenant from the defendants, that they should see the apprentice make up his cash monthly. The defendants did not do this, and money having been embezzled by the apprentice, they brought an action upon the bond. But upon an application to the Court of Chancery, the defendants were enjoined from recovering more than the defendants could prove the apprentice had embezzled in the first month after the embezzlement began.

If, however, a surety is induced to give up a counter security, in consequence of not having received an answer from the creditor to an application made by him to know whether he had executed the order or not, it is no bar to an action upon his own guarantee. Thus, in the case of *Oxley v. Young* (u), where A. having sent an order to B. for certain goods, C. undertakes to guarantee payment to B. upon an undertaking of D. to indemnify C. B. accordingly informs C. that the goods are preparing, and afterwards ships them for A. without giving notice to C. that they are shipped. Afterwards D. desires to recall his indemnity, upon which C. writes to B. to know whether he had executed the order, to which no answer is given by B. for a considerable time, he having gone abroad in the interim; upon this C. supposing, from the silence of B., that the order was not executed, gives up his indemnity to D.: C. however still remains liable to B. on his guarantee.

8. OF THE APPLICATION OF PAYMENTS MADE BY A DEBTOR TO HIS CREDITOR, WHILST A GUARANTEE IS IN FORCE.

Where a party has guaranteed the payment of a particular supply of goods to a third person, and after the debt has accrued, other transactions and dealings continue between the creditor and the debtor; and in the course of such dealings, the latter makes payments on account generally, the creditor will be at liberty to apply such payments in dis-

(s) *Trent Navigation Company v. Harley*,
10 East Rep. 34.

(t) 2 Vern. 518.

(u) 2 H. Bl. 613.

charge of the debt subsequently contracted, and is not obliged to apply them in discharge of the guarantee; for the general rule of law, to be collected from the cases on this subject, is, that where a debtor pays money without specifying, at the time of payment, on what account it is paid, it is in the power of the creditor to apply it to whatever account he pleases; but where it is applied to a particular account by the creditor, which is communicated to the debtor, he cannot afterwards alter the application, so as to accommodate it to particular circumstances. (w) But in a late case it was said, (x) "that if the receiver does not, at the time of payment, make a specific application of it to a particular account, he would have a right to make the application at a subsequent period: and though an entry of such payment may be made to a particular account in the private book of the receiver, not communicated to the debtor, such election is not complete; for the effect of making such an entry shows only that the idea of so applying the payment had passed in his own mind, and is much the same thing as if he had expressed to a stranger his intention of making such application of the payment, and had afterwards refused to carry such intention into effect. But the delivery of an account to the party making the payment, and giving credit in that account for the money received, is a conclusive election, and such as will bind the receiver.

So, if at the time of giving the guarantee, the principal was indebted to the creditor upon a prior account, the latter may apply subsequent payments to the liquidation of the pre-existing debt, although the surety had no intimation of such pre-existing debt. (y) But, if from circumstances attending such payments, it appears that some of them must have been made to meet the subsequent advances of money, or supply of goods, such circumstances, in the absence of other proof, are sufficient to raise a reasonable inference, that they were all so intended; and particularly in favour of a surety. Thus, in the case of *Marryatts v. White*, (z) where the defendant had given a promissory note to the plaintiff as a security for the amount of flour to be delivered to one *Moulds*, who at that time was considerably indebted to the plaintiff on account of prior dealings, which was, however, known to the defendant. Subsequent deliveries of flour were made at three months' credit, which was the usual time of credit, amounting in the whole to 239*l.* 16*s.* 2*d.*, and subsequent payments were made by *Moulds* amounting to 209*l.* 18*s.* It was proved, that a discount had been allowed for immediate payments, and that *Moulds* had in other instances

(w) 1 Taunt. 564. 5 Taunt. 596. 6 Taunt. 597. 14 East Rep. 243. n. a. 6 Esp. Rep. 26. 2 Stra. 1194. 2 Barn. & Cres. 45. Per Bayley Just.

(x) Per Holroyd, Just. in *Simpson v. Ingham*. 2 Barn. & Cres. 74.

(y) *Kirby v. The Duke of Marlborough*, 2 Maule & Sel. 18. (z) 2 Stark. 101.

made payments before the expiration of the credit, upon which discount was also allowed. And the question was, whether these payments were to go in liquidation of the old or new account. Upon which Lord *Ellenborough*, Ch. J. said, " I think that in favour of a surety, such payments are to be considered as paid on the latter account. In some instances, the payments were immediate, and in others before the time had expired, within which a discount was allowed, *ex plurimis disce omnes*; where there is nothing to shew the *animus solventis*, the payment may certainly be applied by the party who receives the money. The payment of the exact amount of goods previously supplied is irrefragable evidence to show that the sum was intended in payment of those goods; and the payment of the sums within the time allowed for discount, and on which discount has been allowed, affords a strong inference, in the absence of proof to the contrary, that it was made in relief of the surety."

9. OF NOTICE TO A SURETY OF DEFAULT MADE BY THE PRINCIPAL.

Upon default made by the principal, the surety should, in all cases, have immediate notice thereof; but particularly where a guarantee is given for the price of goods which are to be paid for by the principal by a bill of exchange, which is afterwards dishonoured; in which case, notice of its dishonour must be given both to the drawer and guarantee. This was determined in the case of *Philips v. Astling*, (a) which was an action against two upon a guarantee, the terms of which were: Memorandum. — " We jointly and separately promise to guaranty a payment of 500*l.* at 5*l.* per cent., say a bill, dated 10th January 1808." The bill was given, dated 11th January, and accepted; and not having been paid, this action was brought. At the trial, there appeared reason to believe that *Davenport* and *Finney*, the drawers, and *Houghton*, the acceptor, were all at this time insolvent, but there was no proof of it. *Davenport* and *Finney* first became plainly insolvent in February 1809, a year after this bill was drawn. There was no evidence of any demand having been made on *Davenport* and *Finney* for the money; and no notice was given them of the dishonor of the bill till the 16th. Something was said of a threat to arrest them, but there was no evidence of a regular notice. As to *Houghton*, he went abroad; but he left a sister here, of whom a demand might have been made; no demand, however, was made at the place where his sister was to be found. The court determined, that notice of the dishonor of the bill should have been given to the drawer and to the defendant. And *Mansfield* Ch. J. said, " At

(a) 2 Taunt. 206.

the trial it was objected that the plaintiff could not recover for several different reasons; first, that the defendants stood as indorsers of the bill, and that as indorsers they had a right to insist on proof of the notice of non-payment, both by the drawer and acceptor. On the other hand it was urged, and, as we think, justly, that this was a general guarantee for payment of a bill; not, as usual, a guarantee that the acceptor should pay, but a contract that either the one or the other should pay; and the consequence is, that if the guarantee paid the bill, he would have a right to come both on the drawer and acceptor for re-payment; and though want of notice would not discharge the acceptor, yet the guarantee, as the holder, had a right to insist on due notice being given to himself of non-payment by the acceptor; and that as to the drawers he had right to insist on notice being given to them of the same fact, for that otherwise he might pay it in his own wrong if they were discharged."

But in the case of *Holbrow v. Wilkins*, (b) where the plaintiffs sold goods to C. and P., and took their acceptance for the amount, half of which was guaranteed by the defendant. Before the bill became due C. and P. became insolvent, of which the defendant was then informed, and also that the plaintiffs looked to him for the sum which he had guaranteed: the Court of King's Bench determined, that, under these circumstances, it was unnecessary for the plaintiffs to present the bill when due, or give the defendant notice of the non-payment of it. *Abbott Ch. J.* said, "This case differs very materially from that of *Philips v. Astling*: the insolvency there did not happen until after the bill became due: but in the present case, the defendant had notice long prior to the bill becoming due that C. and P. were insolvent, and that the plaintiffs would look to him for payment."

(b) 1 Barn. & Cres. 10.

CHAPTER III.

OF CONTRACTS FOR SERVICES AND WORKS : AND OF THE STATUTE OF FRAUDS RELATING TO AN UNDERTAKING WHICH CANNOT BE PERFORMED WITHIN A YEAR.

IF a person is employed to do or transact any business or employment for another, and it is expressly agreed between the parties that it shall be completed for a particular sum of money ; and the work is finished accordingly, an action of *indebitatus assumpsit* will lie for the money so agreed to be given : but if no express agreement be entered into, as to the sum to be paid, the law will imply that the employer undertook or assumed to pay the person employed so much as his labour reasonably deserved ; and upon this implied promise an action of *assumpsit* on a *quantum meruit* will lie. So, where a person is employed to do or perform some particular work, or professional business for hire, the law implies, that the person so engaged not only undertakes to do the work, &c. but also to use all due diligence, skill, and attention in the execution thereof ; so that if he either refuses to do or complete the work, or does it in an unskilful and improper manner, he will be liable to an action of *assumpsit*, at the suit of the employer, for the amount of the damages which he may sustain in consequence thereof. And, when one man engages either to serve or employ another for hire, but afterwards refuses so to do, he is liable to the same kind of action.

But where an agreement is made for any work or service, and it is either expressly agreed, or by necessary implication understood, that the party shall have more than a year to perform it, such agreement must be reduced into writing ; for by the last branch of the 4th clause of the statute it is enacted, " That no action shall be brought to charge any person upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised."

Now upon this clause of the statute it has been holden, that if no time be stipulated for the performance of the agreement, and it is capable of being performed within a year from the making thereof, it is not within the statute, though it be not actually performed till after that period. Thus, where a *parol* promise was made to pay so much money upon the return of such a ship, which ship happened not to return within two years' time after the making of the promise : It was made a question before all the judges whether this promise was void by the statute of frauds. They were of opinion that it was a good promise, and not within the fourth clause of the statute, for that by possibility the ship might have returned within a year ; and though by accident it happened not to have returned so soon, yet, they said, that clause of the statute extends only to such promises, where, by the express appointment of the party, the thing is not to be performed within a year. (a)

So, in the case of *Peter v. Compton*, (b) which was an action upon a *parol* agreement, by which the defendant promised, in consideration of one guinea, to give the plaintiff so many on the day of his marriage. — And the question upon the trial, before *Holt* Ch. J., was whether such agreement ought to be in writing, for the marriage did not happen within a year : the Chief Justice advised with all the judges, and by the great opinion (for there was a diversity of opinion, and his own was *ē contra*) where the agreement is to be performed upon a contingency, and it does not appear in the agreement, that it is to be performed after the year, there a note in writing is not necessary, for the contingency might happen within the year ; but where it appears by the whole tenor of the agreement, that it is to be performed after the year, there a note is necessary ; otherwise not.

So, in the case of *Fenton v. Emblers*, executor of *May*, (c) where the promise was stated in the declaration thus : “ That *William May*, the defendant's testator, in consideration that the said *Sarah* (the plaintiff) would be and become the housekeeper and servant of the said *William*, and take upon herself the care and management of his family, &c., and perform the same as long as it should please the said *William* and *Sarah*, undertook and promised to pay wages to the said *Sarah*, at and after the rate of 6*l.* for one year ; and also by his last will and testament, to give and bequeath to the said *Sarah* a legacy or annuity of 16*l.* by the year, to be paid to her yearly, &c. ; and that the said *Sarah*, confiding in the said promise, entered into the said testator's service, and became his housekeeper, &c. and continued so for three years and 59 days ; but that the said *William* had not per-

(a) *Anonymous Case*, 1 Salk. 280.

(b) *Skin.* 353. *Holt.* 326. S. C. See also *Comb.* 463. *Skin.* 326. S. P.

(c) 3 Bur. 1278. 1 Bl. Rep. 353. S. C.

formed his said agreement, and did not leave her such legacy or annuity, &c. And it appeared upon the evidence that there was such an agreement between the said *William May* and the plaintiff, but that it was by *parol*, and not in writing. It appeared also, that the plaintiff did enter into the testator's service, and continued in such service till his decease; but that the testator did not give her by his last will or otherwise, the said annuity of 16*l. per annum*, or any other annuity. An objection was taken upon the fourth section of the statute of frauds, that the agreement was not to be performed within the year. But *Dennison* Just., and the rest of the Court, were of opinion, "that the statute of frauds plainly means an agreement not to be performed within the space of a year, and expressly and specifically so agreed. That a contingency was not within it; nor any case that depended upon a contingency; and that it did not extend to cases where the thing only might be performed within the year."

An agreement, however, which is in all events to remain unperformed for more than a year, is within the statute; and no *parol* evidence can be given to connect the signature of a subscription to a literary work with the prospectus, so as to take the case out of the statute. Thus, in the case of *Boydell v. Drummond*,^(d) which was an action for not accepting certain numbers of a series of large prints from *Shakspeare's* plays, which had been published by the plaintiff and his late partner Alderman *Boydell*. At the trial, it appeared, that the first prospectus of the work was published in 1786, and a second prospectus in 1787. On the 1st of *May* 1789, the *Shakspeare* gallery was opened in *Pall Mall*, with an exhibition of 34 large pictures then finished; and in *March* 1790, an additional number were exhibited, amounting in all to 56; and also specimens of the prints in a state nearly ready for publication. In *April* 1790, the defendant became a subscriber to the large prints (a splendid edition of the letter-press of the plays, and a series of small prints to bind up with it, forming a distinct part of the proposed plan of publication). The defendant's subscription was No. 1103, the whole number of subscribers at the close having been 1384. At the time of his subscription, the defendant paid his two guineas in advance, and had a receipt given him for the same. The delivery of the first number was made in *June* 1791, when it was delivered to the defendant's order, who thereupon paid the third guinea, and two more in advance for the next number. The second number was delivered to the defendant on the 29th of *March* 1792, was advertised as before, and the defendant also sent for that, and paid his three guineas, two of them in advance for the third number as before. These numbers were delivered out at the gallery in *Pall Mall*, being the place where the defendant had subscribed. Others were delivered

(d) 11 East Rep. 142.

out to other subscribers at Messrs. *Boydell's* shop in the city. After this time, at least one number was delivered to the subscribers in general in every year, sometimes two, and in two instances three within a year, until the whole were completed ; but the defendant never sent for any more of the numbers, though he never gave notice of his intention to discontinue taking them in. Nor did the plaintiff ever make any particular demand on the defendant to take the remaining numbers and pay for them till 1807, after the whole work was completed and published ; but the rest of the numbers as they came out were regularly laid by for him according to the order of time of his subscription. The last number was published in 1803, and the number of prints finally delivered to the subscribers, who sent for them, was 12 more than the stipulated number. One of the conditions of the prospectus was, " that one number at least should be published *annually* ; and the proprietors were confident they should be enabled to produce *two numbers* within the course of *every year*." Printed copies of the two prospectuses were lying about the shop for public inspection at the time of the defendant's subscription, and the general practice was to deliver them to subscribers at the time of their subscription. But the book in which he subscribed his name had only for its title — "*Shakspeare* subscribers, their signatures," without any reference to either prospectus in the terms of it. After the whole work was completed and published, an application was made to the defendant in *August* 1806, and again in *March* 1807, to take and pay for the remaining numbers of his subscription ; to which latter, he returned an answer in writing, dated 1st of *April* 1807, in which he stated, that he ceased taking in the numbers of the *Boydell Shakspeare* many years ago, in consequence of the engagement not being fulfilled on the part of the proprietors ; and not having been applied to from that time till very lately, he did not consider himself called upon to complete the set. The receipt for the defendant's subscription was in this form : " Received from *J. Drummond Esquire* one guinea, as the second subscription to the first number of the *Shakspeare* with large plates ; and at the same time received two guineas as the first subscription to the second number, *agreeably to the original proposals*. (Signed for the plaintiffs.)" The Court, after argument, were of opinion that this case was within the statute. And Lord *Ellenborough* Ch. J. said, " We are all clearly of opinion that this was not a contract which was to be performed within a year, and ought therefore to have been evidenced by writing signed, as required by the statute of frauds. The whole scope of the undertaking shows that it was not to be performed within a year ; and if, contrary to all physical probability, it could have been performed within that time, yet the whole work could not have been obtruded upon the subscribers at once, so as to have entitled the publishers to demand payment of the whole subscription from them within the year. It has been argued that

an inchoate performance within a year is sufficient to take the case out of the statute; but the word used in the clause of the statute is, *performed*, which *ex vi termini* must mean the *complete* performance or consummation of the work: and that is confirmed by another part of the statute, requiring only part performance of an agreement to supersede the necessity of reducing it to writing; which shows, that when the legislature used the word *performed*, they meant a complete, and not a partial performance. If this were not the true construction of the statute, great inconvenience would ensue in the execution of contracts for large works, which must necessarily require a long time for their completion; as in the instance of *Somerset House*, which occupied many years in the building. If one stone were laid within a year from the making of the contract by parol, it would, according to the argument, have taken the case out of the statute, leaving the terms on which the great mass of it was to be built to fallacious memory alone, to be exercised at some distant period; which would let in the very mischief which the statute meant to guard against. Therefore, to exclude perjury, and to perpetuate the true terms of contracts which were not to be performed within a year, there is no doubt that the statute meant a consummate performance within that time. Now here, by the very terms of the contract, and clearly in the contemplation of the parties from the whole scope of it, it was not to be performed within a year; for the agreement was to publish at least one number *annually* after the delivery of the first, and according to the number of the pictures to be published, at the rate of two from each play, the work would consist of many numbers. On this ground the case appears to be clearly within the statute, and the objection taken to the action to be well founded. I cannot connect the subscription of the plaintiff's name in the book with the prospectus; nor does the defendant's letter refer to the prospectus produced at the trial. It speaks indeed of his *engagement* with the proprietors of the *Boydell Shakspeare*; but it cannot be shown to be the engagement contained in the particular prospectus without parol evidence, which the statute excludes. If there had been a plain reference to the particular prospectus, that might have helped the plaintiff; but there is nothing of that kind."

We will now pursue the main subject of the present chapter, and consider it under two general divisions, namely, first, of services and works done and performed upon an employment or retainer, for which the party employed is to be paid either a particular sum expressly agreed upon between the contracting parties; or, if no fixed price be agreed upon, then upon an implied undertaking to pay what is just and reasonable, and which is technically termed a *quantum meruit*. And, secondly, of particular services, which divide themselves into two classes, viz. first, those which are of such a nature as cannot be made the subject of an action, though the employer, who receives a benefit therefrom,

may, perhaps, be bound in honour and conscience to remunerate the party; and, secondly, those services which are performed voluntarily, and with the sole view of being rewarded either by a gift, or by a legacy.

1. OF SERVICES AND WORKS DONE AND PERFORMED, AND TO BE PAID FOR EITHER AT A STIPULATED PRICE, OR UPON A *QUANTUM MERUIT*.

The kind of services and works which are most commonly the subject of discussion in our courts of law, are those which relate to the building or repairing of houses, &c. And upon contracts of this description, we find it has been determined, that where a carpenter or builder agrees to erect any building for a particular sum of money, but additions or alterations are afterwards made, the tradesman is bound by the contract, as far as it can be traced, and entitled to recover upon a *quantum meruit* for the excess only. Thus, in the case of *Pepper v. Burland*,^(c) which was an action of *assumpsit* for work and labour as a carpenter. The defendant proved that the plaintiff contracted to do all the carpenter's work necessary to be done in a house which the defendant was building, for a certain sum. It was admitted that the roof of the house had been done in a manner different from that specified in the contract; and the defendant had paid money into court sufficient to cover the excess. A plan was produced, and proved by the plaintiff, wherein the dimensions of the house were stated to be fifteen feet; but the house on which the work was done was seventeen feet. It did not appear that the plaintiff had ever seen this plan before he began to work; but the house was begun by the bricklayer, on the scale of seventeen feet, before any contract was made with the plaintiff.

Lord Kenyon Ch.J. said, "I have often declared, and have had the good fortune to have my opinion adopted by juries, that where some additions are made to a building which the workman contracts to finish for a certain sum of money, the contract shall exist, as far as it can be traced to have been followed, and the excess only paid for according to the usual rate of charging. I think that the plaintiff has failed in showing the plan by which he contracted to work to be the same as that produced. I admit that if a man contracts to work by a certain plan, and that plan is so entirely abandoned that it is impossible to trace the contract, and to say to what part of the work it shall be applied, in such case the workman shall be permitted to charge for the whole work done by measure and value, as if no contract at all had ever been made: but in the present case the contract is not proved to have been wholly abandoned; for it appears that the dimensions were the same when the

(c) Peake's Cus. N. P. 105.

plaintiff contracted as they were when the building was finished; the only excess was in the alteration of the roof; and money enough to cover that has been paid by the defendant into court. The jury, under this direction, found a verdict for the defendant.

So, in the case of *Robson v. Godfrey*, (f) which was an action to recover the amount of a shipwright's bill. The plaintiff had repaired a vessel belonging to the defendants; and it appeared there was an agreement in writing, which described the work to be done, and regulated the mode of payment. The repairs had likewise been estimated, and the expence ascertained. It was agreed, that the expence should not exceed the sum of 620*l.* And payment was to be made by 100*l.* at a fortnight after the repairs, 100*l.* at a month, 100*l.* at six weeks, and the residue by an approved bill at six months, which had not expired at the time the action was brought. The declaration contained merely counts for work and labour, and materials generally. It was in evidence, that the original plan for the repairs had been varied; that other work had been done by the defendant's order out of the scope of the agreement, and beyond the repairs originally contemplated between the parties. For the defendants it was objected, that the plaintiff should have declared on the special agreement as far as it extended; and for any excess he might have had recourse to his *quantum meruit*. Gibbs Ch. J. before whom the cause was tried, said, "I agree with the principle laid down by the defendant's counsel, that, up to the extent of the estimate, the plaintiff must be paid according to the estimated prices; and beyond the estimate, he is to be compensated on the footing of a *quantum meruit*. But the objection is no ground of nonsuit. This point has been perplexed by cases; but I have always understood the rule to be, that unless there be something in the terms of the special agreement, which either by express stipulation, or necessary intendment, precludes the plaintiff from recovering for work and labour generally, he is entitled, after the contract has been executed, to maintain the present form of action. It is every day's practice to bring an action for goods sold and delivered, though they have originally been ordered upon special terms of agreement. This case falls within the rule I have stated. There are stipulations in this contract which render it impossible for the plaintiff to recover on the common counts; the mode of payment is specifically defined, and the time for which credit was to be given has not yet elapsed. But much of the work was performed under additional orders, independent of the special contract; and for that portion the plaintiff may recover under the common counts. But looking to the provisions of this agreement, I am of opinion, that he cannot recover for the work and labour which were performed under the terms of the written contract."

(f) Holt, N. P. Cas. 236. 1 Stark. 275. S. C.

But where no new or extra work has been done, nor any agreed deviation from the contract, but the builder has improperly departed from the specification and plan, and put in bad materials, &c. it has been holden, that he cannot recover upon a general *indebitatus assumpsit* count for work and labour upon a *quantum meruit*. Thus, in the case of *Ellis v. Hamlen*, (g) which was an action brought by a builder against his employer, upon a special contract for building a house of materials and dimensions specified in the contract, to recover the balance of the sum therein agreed on; the principal part of the price having been paid. At the trial before *Mansfield* Ch. J., the defence was, and the evidence supported it, that the plaintiff had omitted to put into the building certain joists and other materials of the given description and measure. The counsel for the plaintiff proceeded to inquire of the witnesses what additional sum must be expended on the house to make it equal in value to that which was specified in the contract, contending that the plaintiff was entitled to recover in this action the whole sum which was specified in the contract, excepting thereout the amount of this difference in value, which they said would be the measure of damages, if an action had been brought on the contract by the employer against the builder for not performing his contract; and that if the sums which had already been paid to the plaintiff on account did not amount to the whole price specified in the contract, deducting therefrom the amount of the before-mentioned difference in value, the plaintiff was entitled to a verdict for the residue, *minus* that difference. But the Chief Justice was of opinion, that the plaintiff not having performed the agreement he had proved, ought to be nonsuited. The plaintiff's counsel then resorted to the count for work and labour and materials, upon a *quantum meruit*; and said, that the plaintiff having the benefit of the houses, was bound, at least, to pay for them according to their value. But his lordship said, "Suppose you had come hither upon a *quantum meruit* only, could you have recovered on it? Certainly not. The defendant would have said, 'I made no such agreement. I agreed to pay you if you would build my house in a certain manner, which you have not done.' Here the plaintiff has properly declared on his special contract; and he has shown and proved that he made such a contract, and has received much money on it. He cannot now be permitted to turn round and say, I will be paid by a measure and value price. The defendant agrees to have a building of such and such dimensions: Is he to have his ground covered with buildings of no use, which he would be glad to see removed, and is he to be forced to pay for them besides? It is said, he has the benefit of the houses, and therefore the plaintiff is entitled to recover on a *quantum meruit*; to be sure it is hard that he should build houses and not be paid for them; but the difficulty is to

know where to draw the line; for if the defendant is obliged to pay in a case where there is one deviation from his contract, he may equally be obliged to pay for anything, how far soever distant from what the contract stipulated for." The plaintiff accordingly was nonsuited; and the case was never again moved.

In an action of *assumpsit*, by a carpenter, upon a *quantum meruit* for work and labour done, and materials found, it is competent to the defendant, even without notice to the plaintiff, to prove that the work done was not worth so much as the plaintiff claims; and if it appear that the plaintiff has been paid on account as much as the work was worth, he cannot recover. And so it seems that the defendant may be let into such a defence where the contract was for the work to be done at a certain price; at least if he give the plaintiff previous notice of such defence, so that he may be prepared to meet it. Thus, in the case of *Baston v. Butter*, (*h*) which was an action of *assumpsit* for work and labour done, and materials found: At the trial, the plaintiff's witnesses proved, that the defendant employed the plaintiff, a carpenter, to do some work for him on his farm; and the plaintiff's workmen put on a roof on a linhay, and also roofed a barn, (the defendant finding the timber and nails,) and also made gates on the farm, and rails near the house: and the plaintiff demanded 3*l.* 14*s.* 7*d.* as now due; but his witnesses did not make out above 3*l.* On the part of the defendant it was stated, that it would be proved that the work had been done by the plaintiff in a very improper and insufficient manner; that the linhay was too weak in the roof; which, after being covered with thatch, sunk in the middle, so as to let the water through; and that neither the rafters or roof of the linhay or the barn were sufficiently supported. And therefore it was contended, that the plaintiff was not entitled to recover what he now claimed, as remaining due to him. The learned Judge rejected the evidence proposed; and the plaintiff recovered a verdict for 3*l.* with liberty to the defendant to move for a new trial; which was accordingly done. And the Court determined, that as the plaintiff's claim was upon a *quantum meruit*, the evidence offered at the trial, on behalf of the defendant, ought to have been received: and therefore they made the rule absolute for a new trial: and Lord *Ellenborough* Ch. J. said, "In some cases the plaintiff may not be prepared to meet an objection of this sort at the trial; but it does not appear here what had previously passed upon the subject between the parties. Where a specific sum has been agreed to be paid by the defendant, the plaintiff may have some ground to complain of surprise, if evidence be admitted to show that the work done, and materials provided, were not worth so much as was contracted to be paid; because he may only come prepared to prove the agreement for the specific sum and the work done,

(*h*) 7 East Rep. 479.

unless notice be given to him that the payment is disputed, on the ground of the inadequacy of the work done. But where a plaintiff comes into court upon a *quantum meruit*, he must come prepared to show that the work done was worth so much; and therefore there can be no injustice to him in suffering this defence to be entered into, even without notice." Mr. Justice *Le Blanc* said, "I think that in either case the plaintiff must be prepared to show that his work was properly done, if that be disputed, in order to prove that he is entitled to his reward; otherwise he has not performed that which he undertook to do, and the consideration fails. And I think it is competent to the defendant to enter into such a defence, as well where the agreement is to do the work for such a sum, as where it is general to do such a work: and it is open to the defendant to prove, that it was executed in such a manner as to be of no value at all to him, or not to be of the value claimed."

And in a subsequent case of *Farnsworth v. Garrard*, (i) which was an action of *assumpsit* upon a *quantum meruit* for work and labour, and materials found. At the trial, it was proved, that the plaintiff had rebuilt the front of a house for the defendant; but when finished, it was considerably out of the perpendicular, and according to several of the witnesses, in great danger of tumbling down, though others were of opinion that it might stand for many years. Lord *Ellenborough* Ch. J. said, "This action is founded on a claim for meritorious service. The plaintiff is to recover *what he deserves*. It is, therefore, to be considered how much he deserves, or if he deserves anything. If the defendant has derived no benefit from his services, he deserves nothing, and there must be a verdict against him. There was formerly considerable doubt upon this point. The late Mr. Justice *Buller* thought, (and I, in deference to so great an authority, have at times ruled the same way), that in cases of this kind, a cross action for the negligence was necessary, but that if the work be done, the plaintiff must recover for it. I have since had a conference with the judges on the subject; and I now consider this as the correct rule,—that if there has been no beneficial service, there shall be no pay; but if some benefit has been derived, though not to the extent expected, this shall go to the amount of the plaintiff's demand; leaving the defendant to his action for negligence. The claim shall be co-extensive with the benefit. Here then has there been any benefit, and to what amount? If the wall will not stand, and must be taken down, the defendant has derived no benefit from the plaintiff's service, but has suffered an injury. In that case he might have given him notice to remove the materials. Retaining them, he is not likely to be in a better situation than if the plaintiff had never

(i) 1 Campb. 38.

placed them there ; but if it will now cost him less to rebuild the wall, than if it would have done without these materials, he has some benefit and must pay some damages." The jury found a verdict for the defendant.

So, where a person undertakes to perform a work of skill and labor, and fails in the object ; so that his employer derives no benefit whatever from the work, the former is not entitled to any remuneration. (k)

If a man promises to build a mill or house for another, within a certain time, if he fails, no action lies upon this promise, unless there be a consideration alleged for the doing it, it being *nudum pactum*, or a promise without any consideration. (l) So, a count in a declaration stating, that the plaintiff retained the defendant, who was a carpenter, to repair a house before a given day ; that the defendant accepted the retainer, but did not perform the work within the time, *per quod* the walls of the plaintiff's house were damaged, cannot be supported. But a count stating that the plaintiff, being possessed of some old materials, retained the defendant to perform the carpenter's work on certain buildings of the plaintiff, and to use those old materials ; but that, the defendant, instead of using them, made use of new ones, thereby increasing the expence, is good. Thus, in the case of *Elsee* and another v. *Gatward*, (m) which was an action upon the case in *tort*. The first count in the declaration stated, that the plaintiffs, on the 29th of August, 1791, were about to build a warehouse, &c. and to rebuild and repair certain parts of a dwelling-house and stables, &c., and were very desirous of having the warehouse completely tiled and covered in, and the front of the dwelling-house rebuilt, on or before the 1st of November then next ; and also of having the bricklayer's and carpenter's works of the warehouse completely finished on or before the 1st of December ; and the whole of the remaining repairs finished on or before the 25th of December then next ; and thereupon the plaintiffs, on the 29th of August, 1791, at the special instance and request of the defendant, who was a builder, and had full notice of the premises, retained and employed the defendant to do and perform all and singular the bricklayer's and carpenter's works which should be requisite on the occasion aforesaid, within the several times therein before mentioned for the completion thereof respectively : and although the defendant afterwards accepted of such retainer and employment upon the terms aforesaid, and could and ought to have completed all such bricklayer's and carpenter's works within the said respective times, yet the defendant contriving to injure the plaintiffs, &c., did not, nor would completely tile or otherwise cover in the said warehouse, &c. on or before the said 1st of

(k) *Duncan v. Blundell*, 3 Stark. 6.

(l) 1 Rol. Abr. fo. 9. pl. 1. Et vide ante 7.

(m) 5 Term Rep. 143. See also 1 Rol. Abr. 9. pl. 2. 3.

November, nor did nor would finish the bricklayer's and carpenter's works of the warehouse on or before the said 1st day of *December*, and the whole of the remaining repairs on or before the said 25th day of *December*, &c.; but, on the contrary thereof, permitted the said warehouse to continue untilled and uncovered, &c.; in consequence of which said neglect of the defendant, the walls of the said premises were greatly sapped and rotted, and the ceiling damaged and spoiled, and the plaintiffs were obliged to continue tenants of another warehouse and stables, &c. and were thereby put to additional expence, &c. The second count stated, that the plaintiffs, on the 29th of *August*, 1791, being possessed of divers old materials of buildings, retained and employed the defendant, at his special instance and request, to do and perform certain bricklayer's and carpenter's work, upon divers buildings and premises of them, the plaintiffs, and to use and apply, in and about those works, all such parts of the old materials as were fit and proper for that purpose; and that, although divers parts of the said old materials were fit and proper to have been used and applied in and about the said works, yet the defendant, contriving to injure the plaintiffs in this behalf, and to enhance the expence of the bricklayer's and carpenter's works, did not nor would use and apply in and about the said works, such parts of the old materials as were fit, &c. but refused so to do, and wrongfully and injuriously used and applied, in and about the same works, other new and expensive materials, in the stead of such old materials as were fit and proper for the same purposes; whereby the plaintiffs were put to an unnecessary expence, &c., and the old materials became wholly useless, &c. The defendant demurred to these two counts; and the Court, after argument, determined that the first count of the declaration was bad, for want of consideration; but that the second count was good. And Lord *Kenyon* Ch. J. said, "If this had been an action of *assumpsit*, it could not have been supported, for want of a consideration; it would have been *nudum pactum*: and if both the counts be not good, the defendant is entitled to judgment. Now I do not think that the first count in the declaration is good in law. It states that the defendant, who is a carpenter, was retained by the plaintiffs, to build and to repair certain houses; but it is not stated that he was to receive any consideration, or that he entered upon his work. No consideration results from his situation as a carpenter, nor from the undertaking; nor is he bound to perform all the work that is tendered to him: and therefore the amount of this is, that the defendant has merely told a falsehood, and has not performed his promise; but for his non-performance of it no action can be supported. This is warranted by Lord *Holt's* opinion, in *Coggs v. Bernard*, (n) where, recognizing the case in 11 Hen. 4. 33. he said, 'There the action was brought against

(n) 2 Ld. Raym. 919.

a carpenter, for that he had undertaken to build the plaintiff a house within such a time, and had not done it, and it was adjudged the action would not lie.' And on this opinion I think I may safely rely, especially as the justice of the case will not be altered by the form of the action; for if *assumpsit* will not lie in such a case, there is no technical reasoning that will support such an action as for a *tort*. In that case, *Powell* Just. said, 'An action will not lie for not doing the thing, for want of a sufficient consideration; but if the bailee will take the goods into his custody, he shall be answerable for them; for the taking of the goods into his custody is his own act.' Lord *Holt* there put several cases to establish this position, which will reconcile the cases now cited on the behalf of the plaintiffs. In *Brown v. Dixon*, (o) the defendant had received the dog into his possession. This case is very distinguishable from those of common carriers and porters, from whose situation certain duties result; they are bound by law to carry goods delivered to them, and are by law entitled to a recompence: but no such duty results from the situation of a carpenter; he is not bound, as such, to perform all the work that is brought him. It appears to me, therefore, that the first count cannot be supported, there being no consideration expressly stated, nor any consideration resulting from the defendant's employment as a carpenter; though had the defendant performed the work, he might have recovered a satisfaction on a *quantum meruit*. Upon the authority of *Coggs v. Bernard*, and the cases there noticed, not contradicted by any other decision, I think that the first count for nonfeazance is bad, but that the second count may be supported. It is there stated, that the defendant entered upon his employment, and that he did not do that which he ought to have performed, according to his retainer. In that count it is stated, that he undertook to use the old materials; that in fact he did not use those, but substituted new ones in their stead, thereby enhancing the expence to the plaintiffs. This comes within the case mentioned by Lord *Holt*, in *Coggs v. Bernard*, speaking of the same case in the year books; 'but there the question is put to the Court, what if he had built the house unskilfully? and it was agreed in that case, an action would have lain:' for though the defendant could not have been compelled to build this house, and to use the old materials, yet having entered upon the contract, he was bound to perform it; and not having performed it in the manner proposed, an action lies against him."

2. OF SERVICES BY SURVEYORS.] — A surveyor is to be paid for his services upon a *quantum meruit*, and not by an arbitrary per-centage upon the amount of an estimate, or according to the amount of the bills he looks over and settles. Thus, in the case of *Upsdell v. Stewart* (p), which was an action of *assumpsit* for work and labour, as a surveyor:

(o) 1 Term Rep. 274.

(p) Peake's Cas. N.P. 193.

The plaintiff demanded 3*l.* being 5*l. per cent.* on all money charged by and allowed to the different tradesmen. The defendant had paid one half of the sum demanded into court, contending that 2½ *per cent.* was a sufficient compensation for the business the plaintiff had done. He had done nothing more than measure the work, and settle the bills, not being at all employed in building the house. The counsel for the plaintiff offered to call witnesses to prove, that the uniform practice of surveyors was to charge 5*l. per cent.* on all money allowed to the workmen; and he instanced the case of surgeons and others, whose fees were settled by the evidence of professional men, as to the usual charge on such occasions. But Lord *Kenyon* Ch. J. said, "The plaintiff is entitled to a reasonable compensation for his labour, but he is not to estimate that by the money laid out by the defendant in finishing his building. I am bound to give my opinion on the matter of law, the jury will answer as to the matter of fact. I am enabled to state, from the record, what is the true question between the parties. The plaintiff states his demand to be 'as much as he reasonably deserves to have for his work and labour.' Does he reasonably deserve to have this exorbitant demand? As to the custom offered to be proved, the course of robbery on *Bagshot Heath* might as well be proved in a court of justice. It ought not, nor cannot be supported."

3. BY SURGEONS AND APOTHECARIES.]—A surgeon or apothecary may maintain an action of *assumpsit* for labour and attendance, as well as for medicines and other necessary things administered. Though if a surgeon furnishes a bill to his patient, and leaves a blank for his charge for attendances; if the patient pays a certain sum on that account, the surgeon is bound by the sum so paid, he not having made any specific charge. This was determined in the case of *Tuson v. Batting* (q), which was an action of *assumpsit* brought by the plaintiff, who was a surgeon, for attending the defendant's wife: and the matter in dispute was the *quantum* of payment which was claimed by the plaintiff. The defendant lived out of town, and the attendances had been made there: the plaintiff claimed, as a customary charge, one guinea *per mile* for each attendance, in addition to his fee. By this mode of calculation the plaintiff's demand would have amounted to 200*l.*; but he had delivered a bill without a specific charge, leaving a blank for the sum he was to receive. The defendant paid 70*l.* into court: this was taken out, and the plaintiff went for a further sum. Several surgeons were called by the plaintiff, who all proved, that it was cus-

(q) 3 Esp. Rep. 192. Note by the stat. 55 Geo. 3. c. 194. s. 21. it is enacted, "that no apothecary shall recover any charges claimed by him in any court of law, unless he shall prove on the trial that he was in practice as an apothecary

prior to, or on the 5th of August, 1815, or that he has obtained a certificate to practise as an apothecary from the master, wardens, and society of apothecaries."

tomary and usual for surgeons to make the charge of one guinea *per mile* where the attendance took place out of town. But Lord *Kenyon* Ch. J., after observing, that though professional men were entitled to a fair and liberal compensation for their assistance, said, "There are, however, certain claims which they affect to set up, which, if unreasonable or improper, it is the business of the jury to controul, and this appears to be one of them. In the present case the plaintiff delivered a bill, leaving a blank for his attendances: this shows, that he himself considered his demand, in the light of *quiddam honorarium*, leaving it to the generosity of the person he had attended: now that person having paid money into court to a certain amount, I am of opinion, that what has been so paid, must be taken as the sum which he considers as a fair remuneration for the plaintiff's services, and which the plaintiff had left open in his bill; and that he cannot recover any more." It appearing, however, that the defendant had made an offer to pay at a certain rate, Lord *Kenyon* left it to the jury to say, whether the 70*l.*, paid into court, was not sufficient to satisfy the whole of the plaintiff's demand. The jury found that it was, and a verdict was entered for the defendant.

If a surgeon is sent for to attend a pauper, with the knowledge of the overseer of the poor of the parish to which the pauper belonged, he is entitled to be paid for his services by such overseer. Thus, in the case of *Lamb v. Bunce*, (r) where a pauper had his leg accidentally fractured in one parish, and was conveyed to the next house in an adjoining parish, and was there confined and visited by the overseer, and attended by the surgeon, who attended the parish poor, with the knowledge of the overseer: it was determined, that the surgeon might have *assumpsit* against the overseer for the expences of the cure; for there was not any obligation against the parish where the accident happened to pay these expences, and the overseer's knowing of, and not repudiating the surgeon's attendance was equivalent to a request.

It has been held to be a good defence to an action by an apothecary for his bill of charges, that he treated his patient ignorantly and improperly. Thus, in the case of *Kannen v. M'Mullen*, (s) which was an action of *assumpsit* for work and labour as a surgeon and apothecary, and medicines administered. The plaintiff's case being proved, the defendant called Mr. *Cline* and Dr. *Letsom*, who said, that from the plaintiff's bill it appeared that the defendant had been very improperly treated, as medicines perfectly inconsistent with each other had been administered. They confessed that disorders would sometimes take a sudden turn, and that they could not judge so well as they should have been able to do, had they attended the defendant.

(r) Peake's Cas. N. P. 89. See also *Hupe v. Phelps*, 2 Stark. 480.

(s) 4 Maule & Sel. 275. See also *Watson v. Turner*, But N. P. 129. *Atkins Banwell*, 2 East Rep. 505.

attornies' and solicitors' bills of costs. But for conveyancing business only, their bills of costs are not taxable. The remedy for the recovery of an attorney or solicitor's bill of costs, is by action of *indebitatus assumpsit*. It is, however, by the statute 2 Geo. 2. c. 23. s. 23. (made perpetual by the 30 Geo. 2. c. 19. s. 75.) enacted, that "no attorney of the Court of King's Bench, Common Pleas, or Exchequer, &c. nor any solicitor in Chancery, &c. shall commence or maintain any action or suit, for the recovery of any fees, charges, or disbursements, at law, or in equity until the expiration of one month^(y) or more, after such attorney or solicitor respectively; shall have delivered unto the party or parties to be charged therewith, or left for him, her, or them, at his, her, or their dwelling-house or last place of abode a bill of such fees, charges, and disbursements, written in a common legible hand, and in the English tongue, except law terms and names of writs, and in words at length, except times and sums; which bill shall be subscribed with the proper hand of such attorney or solicitor respectively." And this statute provides that the client under certain terms may have his attorney's bill taxed by the proper officers of the different Courts.

But it having been doubted whether an attorney's bill could be delivered with *abbreviations*, it was enacted by the statute 12 Geo. 2. c. 13. s. 5., that "it shall and may be lawful to and for any attorney, clerk in Court, and solicitor, to write his bill of fees, charges, and disbursements with such abbreviations as are now commonly used in the *English* language, any thing in any former law to the contrary notwithstanding." On this statute it has been holden, that an attorney may deliver a bill of costs, containing such abbreviations of *English* words as are usual and intelligible.^(z) And by section six of the same act it is declared "that the said act of the second year of His present Majesty, for the better regulation of attornies and solicitors, or any clause, matter, or thing therein contained, shall not extend to any bill of fees, charges, and disbursements due from any attorney or solicitor, to any other attorney or solicitor, or clerk in court; but every such attorney, &c. may use such remedies for the recovery of his fees, charges, and disbursements against such other attorney or solicitor, as he might have done before the making of the said act."

Upon these and other acts of parliament regulating attornies' and solicitors' bills of costs, a great variety of cases are to be met with in our law books; but they are all so accurately collated and brought together in Mr. *Tidd's* very valuable treatise on the Practice of the Courts, that I cannot do better than refer the reader to that work*, where he will find the result of all the cases clearly digested. In

^(y) This is to be understood a lunar month. 5 Esp. Rep. 168.

^(z) 4 Taunt. 193.

* Chap. iii. p. 89. &c. 7th edition.

one part of that chapter it is stated, (a) that, "if the whole bill be for conveyancing it cannot be taxed. But if any part of an attorney's bill which has been delivered be for business done in court, the bill must be delivered a month before the action is brought, otherwise the plaintiff cannot recover; (b) and a *warrant of attorney*, (c) or *dedimus potestatem*, (d) charged in an attorney's bill, is a sufficient item to enable the Court to refer the bill for taxation; though, with this exception, it be entirely for conveyancing. So, where one of the charges was for drawing and engrossing an affidavit of debt, in order to hold a party to bail, which appeared to have been sworn, the Court of King's Bench held this to be a charge for business done in court, which made the bill taxable. (e) But a charge for preparing an affidavit of the petitioning creditor's debt and bond to the chancellor, in order to obtain a commission of bankruptcy, was holden not to be a taxable item within the statute, as being a charge at law or in equity; the affidavit not having been sworn, nor a commission issued. (f) It has been made a question, whether an attorney may recover for charges or disbursements not taxable, when part of his demand is for business done in court; and the distinction that has been taken is, that he may, where he has delivered no bill at all; but that where he has delivered a bill irregularly, he cannot: (g) and, accordingly, in a late case, (h) an attorney not having delivered any bill to his client before action brought, but having afterwards delivered a bill of particulars under a judge's order, was held to be entitled to recover charges for money paid for his client's use, having no reference to his business of an attorney, although other items in his bill of particulars were taxable. Where an attorney had paid money, in consequence of his undertaking to pay the debt and costs, this was holden not to be a disbursement by him as an attorney, within the meaning of the statute. (i)

An attorney having delivered two separate bills, one of which was for fees and disbursements in causes, and the other for making conveyances, a rule was made in the King's Bench for taxing both. (k) And so, where it was moved that the Master might be directed to tax those articles in an attorney's bill, which related to conveyancing and parliamentary business, the rest being for management of causes in the Court of King's Bench, Lord *Mansfield* said "there was no doubt but the Master might tax the whole; that he recollected a case where the fees paid to a proctor, for business done in the Ecclesiastical Court, made part of the

(a) Tidd's Prac. ch. iii. 93.

(b) 6 Term Rep. 645. Peake's Cas. 102.
1 Campb. 437.

(c) 4 Campb. 68.

(d) 1 New Rep. 266.

(e) 6 Term Rep. 645.

(f) 3 Barn. & Ald. 486.

(g) 1 Campb. 439., and see the cases there cited.

(h) 11 East Rep. 285.

(i) 6 Taunt. 196. 1 Marsh. 539.

(k) Say. Rep. 233. Tidd's Prac. 93.

bill; and it was determined that as the whole bill had been referred to the Master he might tax that part of it." (l) The Court of King's Bench will refer an attorney's bill to be taxed, though all the business was done at the Quarter Sessions (m); and in such case an action cannot be maintained for the amount of the bill, unless it be signed, and delivered a month before the bringing of the action. (n) And a bill was referred to be taxed for business done in a criminal suit in the court of Great Sessions at *Carmarthen*; and though it was objected that it would be impossible for the Master to tax the costs in *Wales*, not knowing the practice there, yet the Court held that he could as well tax these costs as costs in the Spiritual Court; and if he were at a loss he might call in assistance. (o) In the Exchequer, a crown solicitor's bill of costs, for business done under an extent, is taxable. (p) But the Court cannot order a solicitor's bill of costs, for business wholly done in the House of Lords in the prosecution of an appeal, to be referred for taxation; because their officer has no means whereby he may be enabled to tax such a bill. (q) Upon the stat. 5 Geo. 2. c. 30. s. 25. relating to the expences of suing out a commission of bankrupt, it has been holden, that the petitioning creditor is liable to the solicitor for the expence of conducting the commission, up to the choice of assignees. (r) But as between the solicitor and messenger there is no implied contract on the part of the former to pay him his expences. (s) And under the 46th section of the same statute, by which it is enacted, "that all bills of fees or disbursements claimed or demanded by any solicitor, clerk, or attorney employed under any commission of bankrupt, shall be settled, adjusted, and certified by one of the Masters of the Court of Chancery; and so much as the Master shall certify to be due to such clerk, solicitor, or attorney, and no more, shall be paid by the assignee under such commission," it has been determined that an action may be maintained by a solicitor against an assignee for business done under a commission of bankrupt, one month after he has delivered a copy of his bill, although it has not been taxed by a Master in Chancery. (t) But an attorney's bill for obtaining a bankrupt's certificate must be signed and delivered a month before he can be sued thereon. (u)

Though the statute 2 Geo. 2. c. 23. does not extend to bills of fees, &c. between attorneys and solicitors, yet it is said (x) to be the uniform practice of the courts to refer an agent's bill to be taxed, upon the

(l) Doug. 199. in notis.

(m) 4 Term Rep. 496.; but see Id. 124. Barnes, 122. contra.

(n) 5 Term Rep. 694. 1 Esp. Rep. 157. S. C.

(o) *Lloyd v. Massey*, T. 25 Geo. 3. K. B. Tidd's Prac. 94.

(p) *Rex v. Partridge*, T. 56 Geo. 3. 3 Price, 280. West on Extents, 230.

(q) 4 Price, 279.

(r) 1 Rose. Cas. 449. Holt, N. P. Cas. 245—376.

(s) Holt, 247. in notis.

(t) 1 Stark. 278.; and see 2 Campb.

278. 2 Stark. 59. Tidd's Prac. 95.

(u) 2 Taunt. 321. 1 Rose, 119. S. C.

(x) Tidd's Prac. 95.

defendant's bringing into court the sum claimed by the plaintiff. It is not necessary, however, that a bill should be signed or delivered before the commencement of an action. (y) And where business has been done by an attorney for a client who afterwards becomes himself an attorney, the former need not deliver a bill signed, in order to recover his costs. (z) It is not necessary for an executor or administrator of an attorney to deliver a bill of costs for business done by his testator or intestate, before the commencement of an action, the statute 2 Geo. 2. c. 23. s. 23. being confined to actions brought by the attorney himself, and not extending to his personal representatives. (a) But such a bill may be referred to be taxed, on the defendant's undertaking to pay what is due. (b) Where an attorney delivered his bill, and after his death application was made to tax it, and above a sixth part was taken off, it was moved that the executrix might pay the costs; but the Court of King's Bench held that she should not; for the words of the above act impose them upon the attorney or solicitor only; and the executrix is not to blame, if she stand upon his bill, or make out one from his books. (c) Before an attorney's bill has been settled and paid, it may be taxed as a matter of course, at any distance of time (d): but after it has been settled and paid, and the payment has been long acquiesced under, the courts will not refer it to be taxed *as a matter of course*. (e) So, where a bond had been given for the debt five years before, and the vouchers had been delivered up, the Court of Common Pleas would not refer the bill to be taxed; saying an attorney, at this rate, could never be safe. (f) And it is a general rule, that an attorney's bill cannot be taxed at the trial of an action brought upon it, nor after verdict, except under special circumstances. (g) It may also be taxed though there was a special agreement between the attorney and his client that the former should be paid for his time, at a certain rate by the day, besides his expenses (h); or though he has obtained a warrant of attorney from his client, for confessing judgment for the money due upon his bill; and has entered up judgment thereupon. (i) But the plaintiff having paid to an attorney the amount of his bill, cannot after a reduction of the bill by taxation recover the difference. (k)

The statute 2 Geo. 2. c. 23. s. 23. only requires the delivery of a bill, for the *bringing* of an action; and therefore though an attorney cannot bring an action on his bill till it has been delivered a month, that cir-

(y) Doug. 199. in notis. Peake's Cas. 1, 2. 1 Esp. Rep. 221.

(z) 2 H. Blac. 589. 1 Esp. Rep. 420.

(a) 1 Barnard. K.B. 433. Andr. 276. Cas. Pr. C.P. 58.

(b) 1 Salk. 89. 2 Str. 1056. 4 Taunt. 724.

(c) 2 Stra. 1056.

(d) Per cur. T. 34 Geo. 3. K.B. Tidd's Prac. 96.

(e) Say. Costs, 323. Doug. 199.

(f) Cas. Pr. C.P. 109. Pr. Reg. 37.

(g) Doug. 199.; and see 2 Bos. & Pul. 237.

(h) Say. Costs, 321. 2 Barnard. K.B. 164. contra.

(i) Say. Costs, 322. Tidd's Prac. 97.

(k) 2 Stark. 85.

cumstance is not necessary to enable him to *set it off*; but he must not produce it at the trial by surprise. It is however sufficient in such case, to deliver the bill time enough for the plaintiff to have it taxed *before* the trial. (*l*) The delivery of a former bill is conclusive evidence against an increase to charge in a subsequent bill, on any of the *items* contained in it, and strong presumptive evidence against any additional items; but if there were any real errors or omissions in the former bill, they may be rectified; (*m*) and a mistake in the date of *items* in an attorney's bill, which does not mislead, will not vitiate the delivery. (*n*) The month mentioned in the statute is construed to be a lunar month, (*o*) and where a bill of costs is delivered to the party, it must be left with him, and not taken back again. (*p*) Where two persons are liable to an attorney, for business done on their joint retainer, it is sufficient for him to deliver a copy of his bill to one of them from whom he received his instructions, and to whom the management of the business was left by the other: but it seems, that a delivery of a copy of the bill in such case, to the one who did not intermeddle, would not be sufficient; for he cannot be considered as having authority to receive it for both; nor is he likely to know what foundation there is for the charges in the bill. (*q*) And where a party in a cause having changed his attorney in the progress of it, a judge's order was afterwards obtained by the second attorney for the delivery of a bill signed by the first, of his fees and disbursements, which delivery was accordingly made to the second attorney; this was holden by a majority of the judges of the King's Bench to be a sufficient delivery of the bill *to the party to be charged therewith*, within the words and meaning of the statute, so as to enable the first attorney to bring his action against the client for the amount of such bill. (*r*) So, the delivery of a bill to the attorney of the party to be charged, is deemed sufficient, if the party himself attend the taxation, or the bill be shown to have come to his hands. (*s*) If the bill be not delivered to the party it must be left for him at his dwelling-house, or last place of abode; leaving it at the compting-house not being deemed sufficient. (*t*) In an action on an attorney's bill, it is sufficient to give in evidence a judge's order to tax the bill, the defendant undertaking to pay what should appear to be due, and the Master's *allocatur* thereupon (*u*); and the defendant will not be permitted to question the reasonableness of the *items* before a jury. (*x*) In such an action the *nisi prius* record is good *prima facie* evidence to show that the action was not commenced till the expiration of a month after the delivery of the bill (*y*); but where it is material for the defend-

(*l*) Doug. 199. Tidd's Prac. 97.

(*m*) 1 Bos. & Pul. 49.

(*n*) 4 Taunt. 806.

(*o*) 5 Esp. Rep. 168.

(*p*) 1 H. Bl. 290.

(*q*) 2 Campb. 277.; and see 1 Campb. 437.

(*r*) 12 East Rep. 372.

(*s*) 1 Gow. 71. Tidd's Prac. 98.

(*t*) 2 Bos. & Pul. 343.; but see 1 Stark. 524.

(*u*) 2 Campb. 496.

(*x*) Doug. 198.

(*y*) 1 Bos. & Pul. 263.

ant to show that the action was commenced earlier than it appears to have been by the *nisi prius* record, the declaration delivered by the plaintiff is admissible evidence.(z) However, it is advisable in all cases to produce and prove a copy of the writ. Where an attorney has regularly delivered a bill signed, he may give a copy of it in evidence, without proof of notice to produce the original.(a) But unless a duplicate of the bill be kept, the plaintiff cannot give parol evidence of its contents, without a notice to produce it.(b)

Negligence of an attorney in the conduct of a cause, cannot be set up as a defence to an action on his bill of costs in that cause.(c) But if an attorney be retained to prosecute or defend an action or perform any other professional business, the law implies a contract or promise on his part that he will use due diligence, skill, and attention; and if he is guilty of any gross negligence or conducts his business ignorantly and unskilfully, he is liable to an action of *assumpsit* for any damage his client may sustain in consequence thereof. This was settled in the case of *Russel v. Palmer*,(d) which was an action of *assumpsit* against the defendant, he being an attorney and retained by the plaintiff to prosecute an action at his suit against *John Stewart* in the Court of King's Bench, for not charging the latter in execution in due time according to the rules and practice of that Court. The cause was first tried before Lord *Camden*, when a verdict was given for the plaintiff for 3000*l.* the whole debt, by his Lordship's direction; but afterwards a new trial was granted, his Lordship and the Court being of opinion, that he had misdirected the jury, in telling them they ought to find a verdict for the whole debt: whereas this action sounds merely in damages, and the jury ought to have been left at liberty to find what damages they thought fit. But upon the second trial, the jury were told they might find what damages they pleased, and accordingly they found 500*l.*, as it appeared to them in evidence, that *Stewart* was not totally insolvent; and against this latter verdict the counsel for the defendant moved for a new trial upon the ground that the defendant had not been guilty of any negligence, but only an error in judgment in the construction of a doubtful point of practice: for the rule of the Court of King's Bench made in Trinity term in the 2d year of Geo. 1. touching this matter, is in very doubtful words, viz. "If any plaintiff shall obtain judgment in the court here in any action against any defendant a prisoner, and shall not charge the said defendant, so in prison remaining, in execution, upon the judgment so obtained, within two terms next after such judgment so had and obtained, then such defendant, so in prison remaining shall have leave to file common bail, or to sue out a writ of *supersedeas* for his discharge out of custody;" that from the words of this rule, it seems as if

(z) 2 Campb. 497. n.

(a) 2 Bos. & Pul. 237. 3 Esp. Rep. 167.

(b) 2 Campb. 110.

(c) *Templer v. M^r Lachlan*, 2 New Rep. 136.

(d) 2 Wils. 325.

the plaintiff had two terms next after, and exclusive of the term wherein judgment was obtained against the prisoner, to charge him in execution; and therefore it was moved on behalf of the defendant that judgment might be stayed, for two reasons: first, because if the defendant *Palmer* had two terms exclusive of the term wherein judgment was obtained against *Stewart*, and wherein he rendered himself to prison, to charge *Stewart* in execution, then this action is misconceived; and, 2dly, although the meaning and construction of the said rule be, that Mr. *Palmer* ought to have caused *Stewart* to be charged in execution, the very next term after the term wherein judgment was obtained against *Stewart*, and wherein he rendered himself, yet the words of the rule are so doubtful that it can be only considered as an error in judgment in Mr. *Palmer*, and not a negligence in the duty of his office as an attorney. Upon showing cause, the Lord Ch. J. *Wilmot* reported that several eminent practisers were examined upon the trial as to the construction and practice upon the said rule, who said, that of late years it was well understood, that a person surrendering in discharge of his bail after judgment must be charged in execution the very next term after such surrender: some of them said they believed this was not universally known by the city attornies, and that they thought that it was an omission in Mr. *Palmer*, proceeding from want of judgment, and not from any wilful negligence. The Court, however, refused to grant a new trial, saying, "We are all of opinion, that this action is well conceived, and lies against Mr. *Palmer* for negligence; and we have authority to say, that Lord *Camden* is of the same opinion."

But in the case of *Pitt v. Yelden*, (c) which was an application to the Court of King's Bench against an attorney for negligence for not declaring against a defendant in due time, Lord *Mansfield* said, "That part of the profession which is carried on by attornies is liberal and reputable, as well as useful to the public, when they conduct themselves with honour and integrity: and they ought to be protected where they act to the best of their knowledge. But every man is liable to error; and I should be very sorry that it should be taken for granted, that an attorney is answerable for every error or mistake, and to be punished for it, by being charged with the debt which he was employed to recover for his client from the person who stands indebted to him. A counsel may mistake as well as an attorney. Yet no one will say, that a counsel, who has been mistaken, shall be charged with the debt. The counsel, indeed, is honorary in his advice, and does not demand a fee: the attorney may demand a compensation. But neither of them ought to be charged with the debt for a mistake. Not only counsel, but judges may differ or doubt, or take time to consider. Therefore an attorney ought not to be liable, in cases of reasonable doubt."

(c) 4 Burr. 2060.

7. BY PROCTORS.] — Fees payable to proctors, and other officers of spiritual or ecclesiastical courts, in respect of business done by them in those courts, are recoverable at common law by action of *indebitatus assumpsit* or *quantum meruit*, and not by suit in the spiritual courts. This question, however, has been much litigated, and there are resolutions both ways: but the better opinion seems to be that fees cannot be sued for in a spiritual court. (f)

8. BY COMMISSIONERS TO EXAMINE WITNESSES.] — If one be named a commissioner to examine witnesses in a cause depending in Chancery or Exchequer, who officiates accordingly, he may bring an action of *assumpsit* for his labour and pains; for though he is to be considered as an officer of the court, yet he is not compellable to attend against his will, nor does the trust reposed in him make his taking a reward bribery, for the party is to take care to name such as will serve, and it is but reasonable it should be at the charge of him for whom he officiates. (g)

9. BY ARBITRATORS.] — No action will lie for business done as an arbitrator, unless there be an express promise to pay him a sum of money for his trouble. Thus, in the case of *Virany*, executor, v. *Warne*, (h) which was an action of *assumpsit* for work and labour by the plaintiff's testator in his life-time. The plaintiff's counsel, in stating the case to the jury, said, that the action was brought to recover a sum of money due to the testator, for acting as an arbitrator on the part of the defendant, in a dispute which he had had with his partner. Lord Kenyon Ch. J. interrupted him by saying, that he conceived the action was not maintainable: that the appointment of an arbitrator was not of such a nature as to raise a demand for payment; and that he should tell the jury that his opinion was, that the plaintiff was not entitled to recover any thing, unless she could prove an express promise. The plaintiff was therefore nonsuited.

But, in the case of *Hardress v. Prowd*, (i) where the declaration stated, that *whereas the plaintiff, at the instance and request of the defendant, had taken pains to reconcile differences betwixt the defendant and J. S. and others, the defendant promised to pay to the plaintiff 100l. at a certain day; and for this sum the action was brought.* It was objected, that this was no more than a voluntary courtesy: But Glyn Ch. J. held *é contra*; for this was undertaken at the instance of the defendant, and here was a continued consideration, though the pains taken were past; and judgment is said to have been given *nisi*, &c.

10. BY CLERGYMEN.] — An agreement with a vicar to pay him so much *per annum* for preaching is good. (k) So, where a rector gives a person a *title* to the bishop, by which he appoints him curate of his

(f) Vide 1 Mod. 167. 4 Mod. 284.
5 Mod. 238. Gibs. Cod. 1015. *Ld. Ray.*
705. *Doug.* 629.

(g) *Carth.* 208. *Comb.* 186.

(h) 4 *Esp. Rep.* 47.

(i) *Sty.* 465.

(k) 1 *Sid.* 409. 2 *Keb.* 477.

parish church, and undertakes to continue him and pay him a salary, "till he shall be otherwise provided of some ecclesiastical preferment, or for fault by him committed, lawfully removed," the rector cannot remove him without cause while he continues rector of that parish; and the curate may recover his stipend from the rector by action of *assumpsit* upon the title. But if the rector is *bonâ fide* preferred to another living, the obligation ceases. A readership is not an ecclesiastical preferment within the meaning of such a title. (l)

11. BY STAGE PERFORMERS.] — An action will not lie for the breach of an agreement "to dance at the *King's Theatre* in the *Haymarket*, or at such other place as the plaintiff should appoint," if it appear that no license for that theatre was granted by the Lord Chamberlain, as required by the 10 Geo. 2. c. 28., and that the plaintiff did not request the defendant to dance at any other place which was licensed. Thus, in the case of *Gallini v. Laborie*, (m) which was an action of *assumpsit* upon a contract by which the defendant, a foreigner, undertook to come over to *England*, in order to dance ballets at the *Italian* opera in the *Haymarket*, called the *King's Theatre*, or at such other place as the plaintiff should appoint. The defendant never came at all. But it appeared that during the time for which the defendant had engaged, there had been no license from the Lord Chamberlain for the *Opera House*, though the plaintiff's company had exhibited dancing entertainments there, but the plaintiff had a license for performing musical entertainments at a house in *Hanover Square*. No request, however, was made to the defendant to perform there; nor did it appear that he had any notice that the plaintiff had such a license. A verdict, however, was given for the plaintiff: but a motion was afterwards made to the Court of *King's Bench* for a rule to set aside this verdict, on the ground, that inasmuch as the plaintiff had not obtained a license from the Lord Chamberlain to perform entertainments of the stage, the defendant could not be bound by a contract which was contrary to the policy of the 10 Geo. 2. c. 28., and under which he would have been subject to heavy penalties and punishments for exhibiting without such license. If, however, the dancers at the *Opera House* were not considered to come within that statute, then they fell within the prohibitions of 25 Geo. 2. c. 36. s. 2. which enacts, "That every place, &c. kept for public dancing, &c. in *London* and *Westminster*, &c. without a license from the quarter sessions, shall be deemed a disorderly place," and persons found therein may be punished. And further, that the circumstance of the plaintiff having another house licensed for different purposes, could not avail as the defendant had no notice of any other place than the *Opera House* communicated to him. Against this rule it was contended, by the counsel

(l) *Martin v. Hind*, Doug. 141. Cowp. 437. (m) 5 Term Rep. 242.

for the plaintiff, that as the contract was for dancing only, it did not fall within the meaning of the 10 Geo. 2., which prohibits "acting, representing, and performing for hire, gain, or reward of any interlude, tragedy, comedy, opera, play, farce, or other entertainments of the stage," without letters patent from the King, or license from the Lord Chamberlain. All these terms, they contended, must be confined to written performances, or such as were capable of being reduced to writing; because by the 3d section, where the same words are used, it is required "That a true copy thereof shall be sent to the Lord Chamberlain, fourteen days, at least, before the acting, representing, or performing thereof." Now that condition cannot apply to such an entertainment as the present; for there can be no true copy of a dance. The contract does not even specify any particular sort of dance, which might, perhaps, have been described, however inaccurately; but it is for dancing generally. Besides the contract was not confined to dancing at the Opera House, but it was to be at any place where the plaintiff chose; and the defendant never gave him the opportunity of choosing any other place which was licensed, because he never came at all, or proffered himself to the plaintiff. Other persons, with whom the plaintiff also contracted in the like manner, have recovered against him the amount of their salaries, and no such objection was allowed to avail the plaintiff. As to the statute of the 25 Geo. 2. c. 36. it does not apply to this case; for the 4th section expressly provides, that the act shall not extend to the Theatres Royal in *Drury Lane* or *Covent Garden*, or the theatre commonly called the *King's Theatre* in the *Haymarket*. But Lord Kenyon Ch. J. said, "I think the statute of the 10 Geo. 2. does extend to this and every other species of stage entertainment. The words are general; and the intent of the legislature manifestly was to put all places of public diversion under the control of the magistracy. The clause requiring a copy of the entertainment to be previously given to the Lord Chamberlain, of course can only apply to such entertainments as are recited from written performances; and was intended as an additional check against a licentious use of the stage. Possibly the notion of the statutes being confined to such productions, may have arisen from the occasion which is supposed to have given birth to it; and which was some plays written by Mr. *Gay* and others, levelled against the existing administration, with intention of bringing it into disrepute with the people. The subsequent statute of 25 Geo. 2. puts all sorts of places, opened for public diversion, under the direction and appointment of the magistrates at large; and is applicable to other entertainments than those of the stage. The exception in the 4th clause, that the act shall not extend to the *Haymarket* and the other two Royal Theatres, was inserted on a supposition that they would be licensed by the Lord Chamberlain; for the proviso goes on to say, "Nor to such performances and

public entertainments as shall be carried on by virtue of letters patent, or license of the crown, or the Lord Chamberlain." But the legislature evidently did not mean to except these three places, unless they were licensed. Under the former act, no entertainment of the stage, of which dancing is one, can be exhibited without the Lord Chamberlain's license; and none having been obtained in this case, the plaintiff cannot call upon the defendant for the breach of an agreement which, without such license, it was unlawful for him to execute. As to the circumstance of other performers having recovered on similar agreements against the plaintiff for their salaries, those verdicts are right; for being engaged to the plaintiff, and ready to execute the agreement on their part, they ought not to suffer because he did not obtain a license, which it was his business to have procured.

12. BY SCHOOLMASTERS.] — If part of the terms of a school establishment is, "that a quarter's notice shall be given before the removal of a pupil, or to pay for a quarter; and a father, knowing of these terms, removes his son without such notice or payment, he is liable to an action for the amount under a general count of *indebitatus assumpsit*. Thus, in the case of *Eardly v. Price*,⁽ⁿ⁾ which was an action of *assumpsit*, and the plaintiff declared first upon an *indebitatus* count for board and schooling generally; and, secondly, that in consideration that the plaintiff, at the request of the defendant, had received and taken J. W. as a scholar into a certain school or academy kept by the plaintiff, and that J. W. had left the same without giving due notice in that behalf, the defendant promised to pay the plaintiff so much money as he therefore reasonably deserved to have. There were also general counts for work and labour, and for money had and received. The cause was tried before Sir James Mansfield Ch. J., when the terms of the plaintiff's school were given in evidence, by which it appeared, that 30*l.* a year were to be paid for each scholar; and at the foot of the terms was added this stipulation: "A quarter's notice is required to be given before the removal of any young gentleman from school, or to pay for a quarter." *James Wyatt* having been removed without notice, the plaintiff claimed a right to recover 7*l.* 10*s.*, pursuant to the above stipulation. On the part of the defendant it was objected, that no damages could be recovered upon the general counts, but for what had been actually furnished, and that there was no special count in the declaration so framed as to meet the plaintiff's demand. The Chief Justice overruled the objection, and a verdict was found for the plaintiff. And the Court afterwards, on a motion being made for a new trial, confirmed the verdict. And *Chambre Just.* said, "The contract in this case being no longer executory at the time when the demand arose, the objection, founded upon the stipulation being matter of special contract, does not apply."

(n) 2 New Rep. 333.

13. BY PRINTERS.] — By the general usage of the printing trade, a printer is not entitled to be paid for any part of his work until the whole is completed and delivered. And this custom has been holden to be the law of the trade; and as far as it extends, it controuls the general law: and therefore if a work is accidentally consumed by fire before it is entirely printed off, the printer cannot recover any thing for his labor in printing. This was settled in the case of *Gillett v. Mawman*. (o)

14. BY APPRENTICES.] — If a person wrongfully acquires the labor of an apprentice, by having seduced and harboured him from his master's service, he is liable either to an action of *tort*, for special damages for the seduction, or to an action of *indebitatus assumpsit*, for the earnings of the apprentice, at the election of the master. Thus, in the case of *Lightly v. Clouston*, (p) which was an action of *indebitatus assumpsit* for work and labour performed for the defendant at his request by one *Thomas Sinclair* the apprentice of the plaintiff, under an indenture of apprenticeship for a term of years, which, at the time of the work being performed, were unexpired. The defendant seduced the apprentice from on board the plaintiff's ship in *Jamaica*, and employed him as a mariner to assist in navigating his own ship from *Port Royal*, home. The cause was tried before *Mansfield* Ch. J. and the jury found a verdict for the plaintiff, subject to the opinion of the Court on the following objection, namely, that the plaintiff ought to have declared in a special action on the case; and that *indebitatus assumpsit* would not lie. The Court, however, determined that the plaintiff had declared properly, and that the action was maintainable.

So, in the case of *Foster v. Stewart*, (q) which was also an action of *assumpsit* for work and labour by the plaintiff and his servant, and the money counts. And at the trial, it was proved, that the plaintiff's apprentice deserted from the plaintiff's ship, and went on board the defendant's, and secreted himself until the defendant's ship sailed, when he discovered himself to the defendant, who carried him to *Halifax*, to which place he worked his passage, receiving his food; and during the passage, the plaintiff's and defendant's ships were within hail, but the defendant did not make known to the plaintiff that he had his apprentice on board; and on the arrival of the defendant's ship at *Halifax*, the apprentice wished to leave; but defendant persuaded him to remain, promising him either wages or clothes and pocket-money; under which persuasion the apprentice sailed with him to *England*, and did duty as one of the crew, but received no wages or clothes or pocket-money. It was determined, that the plaintiff was entitled to waive the *tort*, and bring *assumpsit* against the defendant for the work and labour of his

(o) 1 Taunt. 137
(p) *Ib.* 112.

(q) 3 Maule & Sel. 191.

apprentice, and to recover a reasonable compensation for the services of the apprentice from *Halifax to England*.

15. BY BAILIFFS OF CITIES, IN PROVIDING BOOTHS, &c. AT ELECTIONS.] — A candidate at an election for members of parliament is not liable for any part of the expenses of the election, except by positive statute, or his own undertaking, notwithstanding a long usage for the expenses being ratably defrayed by the candidates. But a candidate to represent a city or a borough in parliament is liable for a share of the expense of administering oaths to Roman catholic electors, under 34 Geo. 3. c. 73. and if he makes use of hustings, erected by the returning officer for the accommodation of himself or his agents, a promise on his part will be inferred to contribute to the expense of erecting them. (r)

16. FOR PROCURING THE SALE OF AN ESTATE, OR AN ANNUITY; OR OBTAINING A TENANT, &c.] — A promise to pay a sum of money in consideration of the procuring a particular purchase is valid; and when the purchase is completed, an action of *indebitatus assumpsit* for work and labour will lie against the party promising: thus, in the case of *Gordon v. Martin*, (s) which was an action of *indebitatus assumpsit* for work and labour. The plaintiff proved a letter from defendant to him to this effect: "If L. S. shall go through the purchase, (the defendant's brother having been then in treaty with the said L. S. for the sale of an estate,) my brother will give you a handsome gratuity for the trouble and pains you shall be at in transacting that affair, which I promise and assure you shall not be less than 300*l*." And by way of postscript, as follows: "My meaning is, you shall be paid when the conveyances shall be executed." It was also proved, that the plaintiff had forwarded the said purchase, and that L. S. was greatly induced thereto by the good opinion he had of the plaintiff's veracity and judgment, and his recommendation of the said purchase; and whether this evidence maintained the declaration, was saved for the opinion of the Court. The Court held, that though the promise was, that the defendant's brother should pay the gratuity, yet it bound the defendant as much as if he had promised for himself; for the work and labour was at his request, and upon his credit: and Mr. Justice *Lee* said, "That there was a difference between a conditional and an absolute undertaking; as if A. promise to B. such a sum, if C. does not, there A. is but a security for C.: but if A. promise that C. will pay such a sum, A. is the principal debtor; for the act done was on his credit, and no way upon C. That an *indebitatus assumpsit* will not lie upon a special agreement till the terms of it are performed; but when that is done, it raises a duty for which a general *indebitatus assumpsit* will lie:" and by the whole Court the plaintiff had judgment.

(r) *Morris v. Burdett*, Bart. 1 Campb. 218.

(s) *Fitzg.* 302.

So, an action will lie upon a promise, in consideration that A. would procure for B. the enjoyment of a house, with an averment that he had procured it. (t) Or, that he would procure a tenant for B., and get him a sum of money for the lease of certain premises. (u)

So, if A. promise B. 10*l.*, in consideration that he would procure him one who would give him an annuity of 100*l. per annum* for 900*l.* B. does not do it, but procures him one who grants it for 1000*l.*, and A. does agree for that annuity, B. cannot bring an *assumpsit* for the 10*l.* because this varies from the contract; but he may have a *quantum meruit*. (v) Again, in *Webb's case*, (w) where the plaintiff declared, that whereas *Cobham* was indebted to J. S., and J. S. to the defendant, the said defendant, in consideration that the plaintiff would procure the said J. S. to make a letter of attorney to the defendant to sue the said *Cobham*, promised to pay and give to the plaintiff 10*l.* It was objected, here was not any consideration for the *assumpsit*; for the defendant, by this letter of attorney, gets nothing but his labour and travel: but the exception was not allowed of; for in this case, not so much the profit which redounds to the defendant, as the labour of the plaintiff in procuring of the letter of attorney is to be respected.

So, in *Bartlett v. Viner*, (x) upon a motion in arrest of judgment, the case was, an action brought by the administrator of *Bartlett* against the executors of Sir *Robert Viner*; upon such a promise made by Sir *Robert* to the intestate, *scil*: "If you will procure 15,000*l.* to be paid into the exchequer, upon the aid of 12*d.* in the pound, in my name, or the name of such person as I shall direct, I will give you 600*l. &c.*" Upon the trial, a verdict was given for the plaintiff; and *Darnell* said that the action did not lie, because it is brokage, and against the statute of usury; and it being a promise against law, it is not obligatory. But upon consideration of the case, the Court *seriatim* delivered their opinion, that the plaintiff ought to have his judgment; "for nothing appears here in the declaration against law; for the borrower does not pay brokage, nor the lender receive it; but the agreement is between two persons not concerned but only in the procuring the money; and this was an advantage to the defendant, and might be in many cases."

2. OF SERVICES AND WORKS PERFORMED, FOR WHICH NO ACTION LIES.

Besides those cases which have come in review in the first division of this subject, in which we have seen that no action lies for services ren-

(t) Yel. 11.

(u) 1 Taunt. 12.

(v) Per Powell Just. 12 Mod. 509.

(w) 4 Leon. 110.

(x) Skin. 322. Carth. 261. S. C.

dered, as for instance, by a physician, &c., there are others of a different description, such as where a man requests A. to procure administration to be granted to the wife of B. as next of kin to C., and would furnish evidence to enable B. and his wife to receive the dividends; B. and his wife, as such administratrix, promised to pay over to A. the amount of the dividends when received. It was held, that the consideration was insufficient to sustain such a promise. (y)

So, no action will lie to recover a sum of money for endeavouring to obtain a pardon. Thus, in the case of *Norman v. Cole*, (z) which was an action of *assumpsit* for money had and received, to recover a sum of 30*l.* which had been deposited in the hands of the defendant, under the following circumstances: One *Tunstall* being under sentence of death, in *Newgate*, the plaintiff was prevailed upon to lodge that sum in the hands of the defendant, to be applied to the purpose of procuring him a pardon. On the case being opened, Lord *Eldon* Ch. J. expressed a doubt whether the action was maintainable, saying, "that he would hold the plaintiff to very strict proof of the means used to procure the pardon;" and called on the plaintiff's counsel to show upon what grounds they founded their right to recover. They stated that *Tunstall* was a man of good character before his conviction; that one *Merland* being a person of good connexions, and having access to persons of interest, the money was to be given to him for so using his interest, by representing, in favourable terms, the case and character of *Tunstall*. Lord *Eldon* Ch. J. then said, "I cannot suffer this cause to proceed. I am of opinion, this action is not maintainable: where a person interposes his interest and good offices to procure a pardon, it ought to be done gratuitously, and not for money: the doing an act of that description should proceed from pure motives, not from pecuniary ones. The money is not recoverable."

So, an agreement to pay a *per-centage* upon the day on which any money should be received by the defendant through the means of the plaintiff's information, does not entitle the plaintiff to the stipulated reward upon the transfer of stock in consequence of such information, although he might afterwards receive the dividend thereon. Thus, in the case of *Jones v. Brinley*, (a) the plaintiff declared upon a special agreement, that in consideration that he had stated to the defendant that it was in his (the plaintiff's) power to give the defendant certain information which might enable one F. N. to receive a considerable sum of money then due to him, and also in consideration, that the plaintiff at the request of the defendant would give such information to the defendant as might enable the said F. N. to receive the said sum, the de-

(y) 2 Bos. & Pul. 75.

(z) 3 Esp. Rep. 255. See vide *Lamp-*

leigh v. Braithwaite, Hob. 105. Moor, 866. Sty. 465.

(a) 1 East Rep. 1.

defendant undertook and promised the plaintiff to pay him on the day upon which any money should be received by F. N., or by the defendant on F. N.'s behalf, through the means of the plaintiff's information, the sum of 10*l. per cent.* on the money so received. The declaration then averred that the plaintiff did give the defendant certain information respecting divers sums of money which F. N. was entitled to receive under and by virtue of the last will and testament of one A. N., deceased, and that if F. N., through the means of such information, on the 27th January, 1800, did receive the sum of 500*l.* whereby the defendant by virtue of his promise became liable to pay to the plaintiff 50*l.*, &c. The second count stated more generally, that the defendant was indebted to the plaintiff in so much for certain information given by the plaintiff to the defendant at his request, whereby F. N. was enabled to receive, and did accordingly receive divers large sums before then due to him, and being so indebted the defendant promised, &c. There was also the general money counts, and for work and labour. The defendant pleaded the general issue. At the trial, before Lord *Kenyon* Ch. J. the agreement in writing was proved, whereby the defendant "undertook to pay to the plaintiff on the day upon which any money should be received by F. N. or by him (the defendant) on his behalf, through the means of the plaintiff's information, the sum of 10*l. per cent.* on the money which should be so received." It was also proved, that in consequence of information given by the plaintiff to the defendant, F. N. had obtained 500*l.* stock, which had stood in the name of A. N., from whom the defendant derived title as residuary legatee; and evidence was adduced for the purpose of showing, that he had afterwards received ten years' dividends due thereon. It was objected by the defendant's counsel that it was stock, and not money, which had been obtained through the medium of the plaintiff's information, and therefore he was not entitled to recover any thing under the terms of the agreement; and that the dividends were merely consequential to the stock: and it was not the meaning of the parties that 10*l. per cent.* should be paid upon all the interest which might accrue, but merely for the principal sum, if any. Lord *Kenyon* admitted the objection, and nonsuited the plaintiff. A motion was afterwards made to set aside the nonsuit, upon the ground that the proof sustained the agreement; for stock was to be estimated as so much money, into which it was convertible; and that at any rate the receipt of the dividends, due at the time of the transfer of the stock, was a receipt of so much money within the meaning of the agreement. But the Court thought the objection well founded; and animadverted upon the immorality of such bargains as the one in question, which had grown of late into practice.

So, where services are performed voluntarily, and not with any view of immediate reward, but merely in expectation of a legacy; and the

person for whom they are done dies without leaving such expected legacy, no action will lie against the executor or administrator for a recompence for such services. Thus, in the case of *Osborne v. the Governors of Guy's Hospital*, (b) which was an action of *indebitatus assumpsit* for work and labour in transacting Mr. Guy's stock affairs in the year 1720. It appeared that the plaintiff was no broker but a friend; and it looked strongly, as if he did not expect to be paid, but to be considered for it in his will. And the Chief Justice directed the jury, "that if that was the case, they could not find for the plaintiff, though nothing was given him by the will; for they should consider how it was understood by the parties at the time of doing the business; and a man who expects to be made amends by a legacy, cannot afterwards resort to his action."

So, in the case of *Hiccox v. Proud*, (c) which was an action of *assumpsit* on an apothecary's bill for medicines and attendance. It appeared that the plaintiff had never made any regular entries in his books, but had attended the testator in expectation of a legacy, he being related to him; and that he had declared, that had the testator left him any thing, he would never have made a charge. The plaintiff was nonsuited on the principle laid down in the last case. But in the case of *Le Sage v. Cousmaker* and others, executors, (d) which was an action of *assumpsit* for work and labour, the case was as follows: The defendants were the executors of one *Vanveyhever*. The plaintiff was a stock-broker, and in the life-time of the testator, had transacted all his money concerns to a considerable extent; it was also given in evidence, that he had been employed by the testator in several matters, such as keeping his books, translating his letters, &c. and that he was also in the habit of doing for him several acts of attention, and rendering him many services of that nature. The defendants resisted the plaintiff's demand on the grounds that the testator being a man of very great wealth and uncommon parsimony, a foreigner, and without a relation, that the several services upon which the plaintiff grounded his action were gratuitous, and done solely with a view to a legacy on the testator's death. It was further relied on, that a bill having been filed by the executors, all the creditors of the testator's estate had been called upon under a reference to a Master in the Court of Chancery, to put in their several claims, and that the plaintiff, having made his claim, the Master had disallowed it. And the counsel for the defendants contended, first, that the legacy must be taken as a complete satisfaction; and, secondly, that the reference to the Master must be considered as the referring of claims to an arbitrator; and he having awarded nothing to be due to the

(b) *Str.* 728.(c) *Staff. Lent Ass.* 1762, cor. *Wilmot Just. Esp.* N P. 87.(d) 1 *Esp. Rep.* 187.

plaintiff, that it was a complete answer to the case. He then gave in evidence the payment of a legacy of 400*l.* to the plaintiff, under the testator's will, and also the Master's report, by which he disallowed the plaintiff's claim against the estate. But Lord *Kenyon* Ch. J. ruled, that neither was an answer to the plaintiff's demand: "that a legacy was never deemed a satisfaction for a legal demand, when that demand was unliquidated at the time of the legacy given, nor where it was given before the time when the demand accrued, or the debt was contracted, unless it was expressly said in the will that it should be a satisfaction; that nothing in this case appeared which could operate as an ademption of the legacy. As to the Master's report," his Lordship said, "it established nothing; that the party should never be concluded by it from suing in the regular course of law for his demand, though the Master might think fit to report that nothing was due. His Lordship added, that the law was well settled; that if the plaintiff had undertaken the several services proved, without any view to a reward, but with a view to a legacy, that he could not set up any demand against the testator's estate, but of that the jury were to decide." The jury found for the plaintiff 600*l.* damages.

So, where A. employs B. to show his house which is to let, and for his trouble promises that he will make him a handsome present; this is evidence of a contract to pay a reasonable compensation in an action of *assumpsit* on a *quantum meruit*. (c)

(c) *Jewry v. Busk*, 5 Taunt. 302.

CHAPTER IV.

ON PROMISES TO PAY OVER MONEY HAD AND RECEIVED
TO THE USE OF ANOTHER: AND IN WHAT CASES AN
ACTION OF *INDEBITATUS ASSUMPSIT* LIES THEREON.

IF a person receives money, or something which has been converted into money, belonging to another, and has no legal or equitable right to retain it, the law deems this to be so much money had and received to the use of the true proprietor thereof, and raises a promise by implication, on the part of the receiver, to pay it over to him; and upon his refusal to do so, an action of *indebitatus assumpsit* will lie against him at the suit of the rightful owner, as for money had and received to his use. It is observed, by the learned commentator upon the laws of *England*, "That this form of action is a very extensive and beneficial remedy, applicable to almost every case where a person has received money which *ex æquo et bono* he ought to refund." (a) And Lord *Mansfield*, who very much encouraged this form of action, has often declared, "That great benefit arises from this species of action, because the charge and defence are both governed by the true equity and conscience of the case. And in this form of action the plaintiff is not obliged to set forth in pleading the special circumstances from which he concludes, that *ex æquo et bono* the money received by the defendant ought to be deemed as belonging to him; but he is at liberty to declare generally, 'that the money was received to his use,' and to make out his case by evidence at the trial. It is also equally beneficial to the defendant, and the most favorable mode in which he can be sued; for he can be liable no further than the money he has received; and he is entitled, under the plea of the general issue of *non assumpsit*, to give all the circumstances of his case in evidence; he may claim every equitable allowance: in short he may defend himself by every thing which shows that the plaintiff, *ex æquo et bono*, is not entitled either to the whole or any part of his demand." (b) The courts, how-

(a) 3 Bl. Com. 165.

2154. 1 Bos. & Pul. 306. 2 Bos. & Pul.

(b) 2 Burr. 1010. Doug. 138. 4 Burr. 472.

ever, take care that this general mode of pleading do not turn to the prejudice of the defendant: and therefore this form of action will not lie, where it would throw the burthen of special pleading from the plaintiff upon the defendant, or where it would subject him to uncertainty, as to the point to which he should direct his defence; or where it would trench upon established forms, or otherwise introduce inconvenience upon principles of legal policy. (c)

The cases on this subject are so numerous, and extend to such a vast variety of transactions, that it is somewhat difficult to class them in such a manner as to render the division clear and intelligible to the reader. I have, however, endeavoured to effect this object; and I now propose to consider and arrange the subject in the following order: viz.

1. OF MONEY HAD AND RECEIVED BELONGING TO ANOTHER, AND WHICH EITHER OUGHT TO BE PAID TO HIM OR TO BE APPLIED TO A PARTICULAR PURPOSE: AND OF MONEY DEPOSITED WITH A STAKE-HOLDER: AND IN WHAT CASES SUCH MONEY IS RECOVERABLE FROM THE RECEIVER IN AN ACTION OF *INDERBITATUS ASSUMPSIT*.
2. THIS FORM OF ACTION LIES ONLY WHERE MONEY HAS BEEN RECEIVED IN THE FIRST INSTANCE; OR WHERE GOODS, &c. THE PROPERTY OF ANOTHER, HAVE BEEN EITHER ACTUALLY SOLD OR DISPOSED OF; OR WHERE, UNDER PARTICULAR CIRCUMSTANCES, IT MAY BE REASONABLY PRESUMED THAT THEY HAVE BEEN CONVERTED INTO MONEY.
3. OF MONEY OR A DEBT DUE FROM ONE PERSON TO ANOTHER, WHICH, BY AGREEMENT, IS EITHER DIRECTED OR APPROPRIATED TO BE PAID OVER TO A THIRD PERSON: AND IN WHAT CASES IT SHALL BE DEEMED AS SO MUCH MONEY HAD AND RECEIVED TO THE USE OF THAT PERSON.
4. OF MONEY RECEIVED AND PAID BY BANKERS AND OTHERS UPON OR IN RESPECT OF BILLS OF EXCHANGE, PROMISSORY NOTES, CHECKS, OR OTHER SECURITIES: AND WHEN SUCH MONEY IS RECOVERABLE IN THIS FORM OF ACTION.
5. OF MONEY RECEIVED ON BANKERS' CHECKS, BILLS OF EXCHANGE, PROMISSORY NOTES, OR OTHER SECURITIES EITHER POST DATED, OR WITH FICTITIOUS OR FORGED NAMES THEREON.

(c) Cowp. 414. 218. 4 Burr. 1984. 1 Campb. 285. Bac. Abr. i. Vol. 260. Guillian's Ed.

6. OF MONEY RECEIVED BY OR FROM AGENTS, SERVANTS, AND OTHERS, ACTING FOR THEIR PRINCIPALS.
7. OF TRUST MONEY RECEIVED; AND IN WHAT CASES RECOVERABLE BY ACTION OF *ASSUMPSIT*.
8. OF THE PRODUCE OF AN ADVENTURE IN THE SOUTHERN WHALE FISHERY BETWEEN THE CAPTAIN AND HIS CREW, SOLD BY THE OWNER AS THEIR AGENT: AND OF THE SEAMEN'S REMEDY TO RECOVER THEIR INDIVIDUAL SHARES BY ACTION FOR MONEY HAD AND RECEIVED.
9. OF MONEY RECEIVED UPON THE SALE AND PURCHASE OF LANDS, HOUSES, FIXTURES, GOODS, CATTLE, &c. OR IN RESPECT OF SOME ACT TO BE DONE, OR BENEFIT TO BE DERIVED; OR UPON THE SALE OF ANNUITIES, WHERE THE CONTRACT HAS EITHER BEEN RESCINDED, DISAFFIRMED, OR NOT PERFORMED, AND THE CONSIDERATION HAS FAILED: AND IN WHAT CASES THE MONEY SO RECEIVED MAY BE RECOVERED BACK.
10. OF FEES RECEIVED BY COUNSEL.
11. OF PREMIUMS RECEIVED ON MARINE INSURANCES.
12. OF MONEY PAID AND RECEIVED UNDER A MISTAKE; OR IN IGNORANCE BOTH OF THE LAW AND OF THE FACT: AND OF VOLUNTARY PAYMENTS MADE BY A PARTY EITHER WITH FULL KNOWLEDGE OF ALL THE CIRCUMSTANCES; OR, HAVING THE MEANS OF SUCH KNOWLEDGE AT THE TIME, OMITTING TO MAKE DUE ENQUIRY, &c. INTO THE CIRCUMSTANCES UNDER WHICH THE CLAIM IS MADE.
13. OF COMPULSORY PAYMENTS MADE EITHER UPON A PLEDGE OF GOODS, OR FOR A FINE UPON ADMITTANCE; OR UNDER LEGAL PROCESS, &c. OR UPON A THREAT OF AN ACTION, OR DISTRESS, &c. OR UNDER MERE COLOR OF PROCESS.
14. OF MONEY RECEIVED UNDER A VOID AUTHORITY; WHETHER JUDICIAL OR OTHERWISE.
15. OF MONEY RECEIVED *MALÂ FIDE*, OR OBTAINED BY DECEIT, MISREPRESENTATION, OR OTHER FRAUDULENT MEANS.

16. IN WHAT CASES MONEY RECEIVED BY OR FROM SHERIFFS, BAILIFFS, GAOLERS, OR THEIR DEPUTIES, &c. MAY BE RECOVERED BACK.
 17. OF MONEY RECEIVED BY THE RECEIVER GENERAL OF A COUNTY FOR A PARTICULAR PURPOSE; OR BY REVENUE OR OTHER PUBLIC OFFICERS, EITHER BY MISTAKE OR OTHERWISE.
 18. OF EXCESS OF TOLL RECEIVED BY TOLL-GATE KEEPERS.
 19. OF MONEY RECEIVED BY PARISH OFFICERS FOR THE MAINTENANCE OF BASTARD CHILDREN.
 20. OF MONEY RECEIVED UPON AN ILLEGAL CONTRACT OR TRANSACTION WHICH IS EITHER *MALUM IN SE*, OR *MALUM PROHIBITUM*: AND IN WHAT CASES THE PARTIES ARE DEEMED *IN PARI DELICTO* TO SUCH AN EXTENT, AS TO DEPRIVE THE PARTY PAYING THE MONEY FROM RECOVERING IT BACK FROM THE RECEIVER.
 21. IN WHAT CASES THIS FORM OF ACTION WILL LIE FOR FEES OR ACCUSTOMED DUES RECEIVED, AND WHICH ARE EITHER CLAIMED BY ADVERSE PARTIES, OR WHERE THE RIGHT OF TAKING THEM IS DISPUTED: AND AGAINST WHOM THE ACTION LIES.
 22. OF PRIZE MONEY RECEIVED; AND WHEN THE RIGHT TO DISTRIBUTIVE SHARES MAY BE TRIED IN AN ACTION FOR MONEY HAD AND RECEIVED.
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1. OF MONEY HAD AND RECEIVED BELONGING TO ANOTHER, AND WHICH EITHER OUGHT TO BE PAID TO HIM, OR TO BE APPLIED TO A PARTICULAR PURPOSE; AND OF MONEY DEPOSITED WITH A STAKE-HOLDER: AND IN WHAT CASES SUCH MONEY IS RECOVERABLE FROM THE RECEIVER IN AN ACTION OF *INDEBITATUS ASSUMPSIT*.

As a general rule it is said, (d) "that if a man receive money which ought to be paid to another, or be applied to a particular purpose, but to which he does not pay or apply it, an action of *indebitatus assumpsit* will lie as for money had and received." And therefore if A. delivers

(d) Willes Rep. 404.

money to B. to be paid over to C., the latter may recover it of B., by action of *indebitatus assumpsit* for money had and received for the use of C. (e) So, if money be delivered by A. to B. to buy a horse, or any other thing, but which he neglects to do, and refuses to return the money, an action of debt, or an action on the case will lie for so much money had and received to A.'s use. (f) So, in the case of *Poulter v. Cornwall*, (g) it was held, that if a man receive money for a special purpose, and neglect or refuse to apply it to the uses for which he received it, an action on the case will lie as for money had and received. And it was observed by Mr. Justice Willes, (h) "That though a bill in equity may be proper in several of these cases, yet an action at law will lie likewise; as, if I pay money to another to lay out in the purchase of a particular estate or any other thing, I may either bring a bill in equity against him, considering him as a trustee, and praying that he may lay out the money as directed; or I may bring an action against him as for so much money had and received for my use."

So, where money belonging to a benefit society was entrusted to the care of one, who had been a member of it; and he afterwards refused to account to the society, the treasurers of the society, under the statute 33 Geo. 3. c. 54. s. 4., may recover the money in their joint names. Thus, in the case of *Sharp and another v. Warren*, (i) which was an action of *assumpsit* for money had and received: and upon the trial it appeared, that the parties had been all members of a benefit club under articles which had been duly enrolled. The plaintiffs had originally acted as stewards of the club, and the defendant as auditor. And the action was brought by the plaintiffs to recover a sum of money, constituting the funds of the society, which had been placed in the hands of the defendant, by them, for safe custody; but the defendant had violated his trust by applying the money to his own use, and refusing to pay it over. For the purpose of the present suit, the plaintiffs were, previous to its commencement, appointed treasurers to the society. It was objected, first, that the act of parliament had not authorized the appointment of two treasurers; and therefore the plaintiffs were not entitled to sue. Secondly, that the defendant, being himself a member of the society, was a partner, and a tenant in common with the other members; and therefore could not be sued in this form of action. And, thirdly, that the act of parliament, having by the 8th section, expressly provided a remedy in cases of this sort, where money, constituting part of the general fund, was withheld by an officer of the society, to whom it had been entrusted, and who should refuse to ac-

(e) 1 Rol. Abr. 7. pl. 2. See also 1 Rol. Abr. 27. pl. 51. *Ib.* 52. pl. 13. 1 Vent. 153. 1 Bos. & Pul. 296.

(f) Owen Rep. 26.

(g) 1 Salk. 9.

(h) Willes Rep. 405.

(i) 6 Price Rep. 151.

suit, by petition to the Court of Chancery, or the Court of Exchequer, had precluded the right of suing by action at law, whereby the money of the club would be unnecessarily squandered. The Court of Exchequer, however, overruled all these objections: and Mr. Baron Wood said, "As to the appointment of the treasurer, the act empowers the members to appoint two persons to the office if they think fit: — the 4th section expressly enacts, that such societies shall and may elect and appoint such persons (in the plural) into the *office* of *treasurer*, &c. and to elect and appoint others in the room of those who should die; and that is made still more clear by the subsequent language of the section, which speaks of the treasurers in the plural, which would otherwise be nonsense. The question then is, whether the rule of the society abridged the power given to them by the act. The object of the rule was merely to enable the members, for the sake of convenience, to appoint a treasurer at a monthly, instead of a yearly meeting. They use the word 'treasurers' as meaning the office of treasurer, and in that sense it would be absurd to suppose that they meant to abridge, by the rule, their own power as given by the statute. There is therefore no pretence for the objection. Both by the statute, and by their rule, they had a power to appoint two or more persons to the office, and that is what they have in fact done. The next objection is, the defendant being a partner. Now, without reverting to the terms of the act of parliament, I think that enough appears from the facts of this case to enable the plaintiffs to maintain the present action; for the promise laid in the declaration must be implied from the circumstance of the defendant's having the money of the society in his hands after he had left the club, and when he had consequently ceased to be a partner. I may, however, ground myself on the words of the act; for the 11th section enacts, that the monies, &c. of the society shall be vested in the treasurer or treasurers (or other officers) for the use and benefit of the society, and in the succeeding officers, for all purposes of action and suit, and that it shall for those purposes be taken to be the property of such officers, who are authorized to bring actions in their own name." As to the specific remedy given by the statute, it is clear, that that does not preclude the plaintiffs from suing the defendant in a court of law. That does not deprive the plaintiffs of any pre-existing right; it gives merely an additional remedy, and all the remedies are concurrent, and the plaintiffs may choose whichever is most suitable to their case. I am of opinion, therefore, that these persons were properly appointed treasurers, and that they may maintain the present action in their own names; and that notwithstanding they have a more summary remedy given to them by the act of parliament."

OF MONEY DEPOSITED WITH A STAKEHOLDER.] — Where money in litigation between two parties has, by mutual consent, been paid over

to a stakeholder in trust for the party entitled, it can only be sued for and recovered from the stakeholder by the party entitled to it, and not from the original party who was indebted, though he agree to wave all objections to form. (k) But where one, who had voluntarily offered to pay a sum of money for the use of the poor of the parish, in order to avoid a prosecution by a magistrate, upon a charge of having instigated the escape of a prisoner in custody for a misdemeanour; which offer was consented to by the magistrate, and the money accordingly paid by the party to the master of the workhouse for the use of the poor; he may, at any time before the money is so applied, countermand the application of it, and may recover the same back in an action for money had and received. (l)

An auctioneer who receives money by way of deposit upon a contract for sale of lands, &c. is considered as a mere stakeholder for the vendor and vendee; and he cannot legally part with the deposit till such time as it shall appear, in the event, to whom the money properly belongs. (m)

Where money is deposited by A. with B. to distribute amongst A.'s creditors in proportion to their respective claims, no one of these can maintain an action against B. before the proportions of all the claimants have been ascertained. (n)

If money be deposited in the hands of a stakeholder, for the purpose of being paid over to the winner on the event of a legal wager, an action of *indebitatus assumpsit* will lie by the winner against the stakeholder. Thus, in the case of *Temple v. Wells*, (o) which was an action of *indebitatus assumpsit* for money had and received: and it appeared that the plaintiff and another had laid a wager, and had deposited the money betted with the defendant; the plaintiff proved that he had won the wager, and the Court determined that the action was well brought; for upon the wager being won, the money was actually the plaintiff's. It has also been determined that if money be deposited with a stakeholder on the event of a battle to be fought by the parties laying the wager; and after the battle, a dispute arises as to which of them was the winner, and the money has not been paid over, each party may recover from the stakeholder the sum deposited by him. Thus, in the case of *Cotton v. Thurland*, (p) which was an action for money had and received, to recover back fifteen guineas, which had been deposited by the plaintiff, as his share of a stake, in the defendant's hands, upon the event of a boxing match between the plaintiff and another person. There was some dis-

(k) *Ker v. Osborne*, 9 East Rep. 378.

(l) *Taylor v. Lendey*, *ibid.* 49.

(m) *Burrough v. Skinner*, 5 Burr. 2639. Et vide post sec. 9. of the present chapter.

(n) *Robson v. Andrade*, 1 Stark. 372.

(o) 10 Mod. 315. Vide Holt's Rep. 37.

Dawson v. Scriven, 1 H. Bl. 218., which was an action against the clerk of a course for a subscription-purse, at the suit of the winner.

(p) 5 Term Rep. 405. And see *Disney on Gaming and Wagers*, cap. 2.

pute as to the event of the battle which was fought, the plaintiff being supposed to have lost it by striking a foul blow; but the defendant having been warned by a friend of the plaintiff not to pay the money over till the parties met, and the matter was decided, the defendant promised that he would not. Mr. Justice *Grose*, before whom the cause was tried, was of opinion that the money having been deposited with the defendant for an illegal purpose, could not be recovered back by the plaintiff; and therefore directed a nonsuit. But a rule was afterwards obtained to show cause why the nonsuit should not be set aside, and a new trial granted. The case which governed the opinion of the learned judge at the trial, was a case of *Camm v. Alder*, before *Wilson J.* at the *Worcester* spring assizes, 1790. It was an action for money had and received, in which it appeared that the plaintiff and another person deposited in the defendant's hands five guineas each, as a wager upon the event of a boxing match between the plaintiff and another man. The battle was fought, and the action was brought only to recover the five guineas deposited by the plaintiff: but *Wilson J.* upon the opening of the case, was of opinion, that the transaction was illegal, and nonsuited the plaintiff. And he cited a case determined by Lord *Mansfield*, at *Guildhall*, where a person lent 50*l.* to another, who was to fight for that sum, upon condition that if he won, he was to have the 50*l.* again. The borrower won the battle, and the action was brought against him by the lender to recover the 50*l.* so lent; but Lord *Mansfield* thought the transaction illegal, and nonsuited the plaintiff. The Court, however, overruled the case of *Camm v. Alder*, and determined, that the plaintiff was entitled to recover the money. And *Ashhurst Just.* said, "There is neither equity or conscience on the part of the defendant; for if the contract were illegal between the parties to the wager, yet as long as the money remains in his hands he is answerable to some one for it; and if the event on which the wager was laid be not decided, he ought to restore one half of the money to each party."

So, money deposited with a stakeholder as a bet, on the event of a foot-race, may be recovered from him by either party, in an action for money had and received, after the race has been run, and the parties differ as to the winner. And a nonsuit on the ground that such actions are an idle waste of the time and hindrance of the business of courts of law, was set aside. These points were settled in the case of *Bate v. Cartwright*, (q) which was an action for money had and received, brought to recover a sum of 10*l.* deposited in the hands of the defendant, as stakeholder of the sums betted, to abide the event of a wager of 5*l.* on a foot-race. Mr. Baron *Garraw*, before whom the cause came on to be tried, nonsuited the plaintiff; holding that the wager was in itself of that

(q) 7 Price's Rep. 540. But see *Brandon v. Hibbert*, 4 Campb. 37.

nature which the courts had, according to the current of authorities, endeavoured to discourage, by refusing to try such frivolous questions, arising out of the idle folly of parties, to the hindrance of the sober and necessary business of the other suitors. But the Court of Exchequer afterwards granted a rule to shew cause why that nonsuit should not be set aside on the authority of the case of *Cotton v. Thurland*.^(r) The substance of the evidence at the trial was, that the plaintiff and another person had betted 5*l.* on the race, and had deposited the money in the hands of the defendant; and the race having been run, and the plaintiff having, as he stated, won the wager, sought by this action to recover the 10*l.*; but there being some doubts suggested to him as to his right to recover the whole, he afterwards insisted only on the sum of 5*l.* originally deposited by him. And, after argument, in which all the authorities on the subject were cited, the Court determined, that the wager was not illegal; and that the plaintiff was entitled to recover the amount deposited with the defendant. And Mr. Baron Wood observed, "that where a plaintiff's right to bring an action was doubtful in law, he should consider that a judge could not refuse to try it." And the Lord Chief Baron in delivering the opinion of the Court said, "The question is, whether the action lies? The last, and indeed the only decision that can be said to be in point, is that of *Cotton v. Thurland*; and that, we think, determines this point. Lord Kenyon, in delivering his judgment on that occasion, distinguishes the case of an action brought against a stakeholder, from that of a policy of insurance, where the risk has been run, and the party attempts to regain his money: and he put entirely out of the question the illegality of the subject matter of the wager. The principal ground on which that case appears to have been determined was the fact of the money being still in the hands of the stakeholder; and the other judges concur with him, Mr. Justice Grose changing his former opinion, and the Court overruling the decision of Mr. Justice Wilson. We are therefore bound by a case determined so solemnly; and although many cases have been cited in support of the nonsuit, all of which we have looked into, we think that there are none that can sustain it against the authority of that which I have particularly mentioned."

(r) Ante 272.

2. THIS FORM OF ACTION LIES ONLY WHERE MONEY HAS BEEN RECEIVED IN THE FIRST INSTANCE; OR WHERE GOODS, &c. THE PROPERTY OF ANOTHER, HAVE BEEN EITHER ACTUALLY SOLD OR DISPOSED OF; OR WHERE, UNDER PARTICULAR CIRCUMSTANCES, IT MAY BE REASONABLY PRESUMED THAT THEY HAVE BEEN CONVERTED INTO MONEY.

The subject matter of the action for money had and received must, in general, be for money only, and not for any specific thing: and, therefore, in the case of *Nightingal v. Devisme*, (s) it was determined, that an action of *indebitatus assumpsit* for money had and received will not lie for the transfer and receipt of stock in the public funds, unless it be actually converted into money. So, where goods are distrained for rent in arrear, but the landlord afterwards delivers them up to the tenant upon his promising to pay the rent; an action for money had and received will not lie for the value of the goods, though the tenant neglects to pay the arrears of rent. (t) But where upon a wager of ten guineas to one, the stakeholder received country bank-notes, and paid them over wrongfully to the party who had lost the wager; it was holden that an action for money had and received would lie at the suit of the winner: Lord *Ellenborough* Ch. J. observing, "that provincial notes were certainly not money; yet, if the defendant received them as money, and all parties agreed to treat them as such at the time, he should not be permitted to say they were only paper and not money. As against him it was so much money received by him." (u)

So, where an insurance broker having received credit in an account with an underwriter for a loss upon a policy, whereupon the name of the underwriter was erased from the policy; it was holden that the principal might maintain an action for money had and received against the broker, although he had not actually received any money from the underwriter: for the broker having deprived the plaintiff of his remedy against the underwriter, and having received credit in account for the money, he was estopped from saying that he had not the sum in his hands for the plaintiff's use. (v)

So, where property was assigned as a security upon a loan of money, and afterwards sold by the lender, upon default of payment; he was held liable to be sued for the surplus, after satisfying his debt. Thus, in the case of *Prouting v. Hammond*, (w) which was an action of *indebitatus assumpsit* for money had and received. It appeared, the plaintiff had assigned his ship to the defendant as a security for the repayment of

(s) 5 Bur. 2589. Et vide 1 East Rep. 1.

(t) *Leery v. Goodson*, 4 Term Rep. 687.

(u) *Pickard v. Bankes*, 13 East Rep. 20.

(v) *Andrew v. Robinson*, 3 Campb. 199.

(w) 8 Taunt. 688.

money; but on the register it appeared to be an absolute assignment: And the defendant afterwards sold the ship, and told the plaintiff that he had received the purchase-money, and would account to him for the balance of the proceeds of the sale: the Court held, that the plaintiff was entitled to recover such balance in this form of action, and that the acknowledgment was sufficient to support the action.

So, where a person receives goods, &c. the property of another, and converts them into money, an action of *indebitatus assumpsit* (in some cases) will lie, to recover the money so raised, &c. Thus, in the case of *Longchamp v. Kenny*,^(x) which was an action of *indebitatus assumpsit* for money had and received, &c. The facts were as follow: The plaintiff was a waiter at one of the great subscription houses, or clubs, in *St. James's Street*, of which the defendant was master. Each of them had received from Mrs. Cornely's a number of masquerade tickets to dispose of, for which they were to account after the masquerade, by paying the value, or returning the tickets. *Kenny* had got possession of one of the tickets which had been delivered to *Longchamp*, and when Mrs. Cornely's agent came to demand an account of *Longchamp's* tickets, he was told by *Longchamp*, that *Kenny* had had one of them, and he must pay for it. Upon this the agent went and made a demand on *Kenny*, who said, "well, if I had it, what then? Go to the person who received it of you, and let him pay you." *Longchamp* was then threatened with an arrest, on which he paid five guineas (the value of the ticket) to Mrs. Cornely's agent, and then brought this action against *Kenny*. At the trial, the plaintiff obtained a verdict of five guineas; but a question was reserved for the opinion of the Court of King's Bench, whether the action should have been *trover* or *assumpsit*? The Court determined that *assumpsit* was the proper form of action. And Lord Mansfield Ch. J. said: "It is certain that where the demand is for a specific thing, an action cannot be maintained in this form. Great benefit arises from a liberal extension of the action for *money had and received*; because the charge and defence in this kind of action, are both governed by the true equity and conscience of the case. But it must not be carried beyond its proper limits. The plaintiff must never be permitted to turn the generality of the count into a surprise upon the defendant, by deserting the ground which the defendant was led to judge the only matter to be tried, and resorting to another of which he could not have the least suspicion. If the present action had been brought without notice of the nature of the demand, I should have thought it could not have been supported. But here the defendant came prepared. If he sold the ticket, and received the value of it, it was for the plaintiff's use, because the ticket was his. Now, as the defendant has not produced the ticket, it is a fair presumption that he has sold it."

(x) Doug. 137.

So, in the case of *Norris v. Napper*, (y) which was also an action of *indebitatus assumpsit*, for money had and received. The facts proved at the trial were, that the plaintiff was a soldier in Lord Arran's regiment of horse, in the defendant's troop; the regiment being commanded for *Holland*, the plaintiff and his horse were shipped on board a transport, and in their passage met with such a storm, that by the working of the ship the plaintiff's horse was killed; that several other horses were lost in the same storm; and the *queen* made an allowance of 15*l.* per horse, for every horse that was lost, to remount the troopers, which was paid by the *queen* to Lord Arran, for all the horses that were lost, and by him laid out in buying horses; fifteen of which horses were sent to the defendant to supply the loss in his troop, but before these horses came over the plaintiff was broke, and so was never remounted; that when the plaintiff came into the troop he brought in his own horse. *Holt Ch.J.* held, that this evidence maintained the action; for though the captain, the defendant, did not actually receive the 15*l.* in money, yet he received a satisfaction which was money's worth, and the plaintiff cannot bring trover for the horse because he cannot claim any one of the fifteen horses in particular, none having been ever delivered to him. But the reporter adds, that at the counsel's request it was made a case for his further consideration; and it does not appear whether it was ever finally determined.

So, in *Abbotts v. Barry*, (z) where the defendant having fraudulently induced the plaintiff to sell goods to A. who could not pay for them; and, on the nominal re-sale of these goods by A. in which the defendant was really concerned, having himself obtained the money paid on such re-sale: it was held that the plaintiff might, in an action for money had and received, recover from the defendant the value of the goods unpaid for by A. So, in the case of *Glyn bart. v. Baker*, (a) where it appeared, that the plaintiff and the defendant having each lodged their respective *India* bonds with the same bankers, who afterwards privily, and without the defendant's authority, sold his bonds; and upon his demand of them, delivered up to him the *India* bonds of the plaintiff to the same total amount, and payable to the same obligee (he being always the treasurer of the company, who indorses such bonds in blank before they are circulated), but having different numbers, and for different separate sums, and therefore manifestly distinguishable from his own bonds; though the defendant did not know that they were the property of another, but was told by the bankers that they had exchanged his original bonds for these: the Court determined, that the defendant having sold the plaintiff's bonds, so received from his own agents, who had acted *malâ fide* in passing them to him, was liable to answer over to.

(y) *Ld. Raym.* 1007.

(z) 2 *Brod. & Bing.* 369:

(a) 13 *East Rep.* 509.

the plaintiffs for the amount, in an action of *assumpsit* for money had and received to their use.

3. OF MONEY OR A DEBT DUE FROM ONE PERSON TO ANOTHER, WHICH, BY AGREEMENT, IS EITHER DIRECTED OR APPROPRIATED TO BE PAID OVER TO A THIRD PERSON: IN WHAT CASES IT SHALL BE DEEMED AS SO MUCH MONEY HAD AND RECEIVED TO THE USE OF THAT PERSON.

It is a general rule of law, that *choses in action* are not assignable: and therefore where a person, entitled to money due from another, assigns over his interest in it to a third person, or orders it to be paid to him, the mere act of assignment or order does not entitle the assignee to maintain an action for it: for the debtor may refuse his assent; he may have an account against the assignor, and wish to have his set-off. And accordingly in the case of *Crifford v. Berry*, (b) where A., to whom wages were due from the *East India Company*, authorised the defendant to receive the same, and pay them over to the plaintiff, to whom he was indebted: and the plaintiff brought an action of *indebitatus assumpsit* against B., the defendant, for the amount. But *Holt* Ch. J. said, "that the action could not be maintained by the plaintiff;" and directed him to be nonsuited.

But if there be an assent or promise on the part of the debtor or holder of the money, in that case it has been holden, (c) that the action of *indebitatus assumpsit* for money had and received is maintainable. So, in the case of *Ward v. Evans*, (d) which was an action of *indebitatus assumpsit* for 60*l.* received by the defendant to the use of the plaintiff. The facts were as follow: one *Fellows*, a merchant, who kept his cash with the defendant Sir *Stephen Evans*, a goldsmith, in *Lombard Street*, was indebted to the plaintiff in 60*l.* 10*s.* the plaintiff sent his servant to receive the money of *Fellows*, who ordered his servant to pay *Ward's* man the money at Sir *Stephen Evans's*. Accordingly both the servants went to Sir *Stephen Evans's* shop, and there *Fellows's* servant directed the defendant's servant, to pay *Ward's* servant the 60*l.* 10*s.* and to indorse it on a note of 100*l.* from the defendant to *Fellows*, in part of payment of the 100*l.* The defendant's servant accordingly indorses 60*l.* 10*s.* as paid on the said note of 100*l.* and then paid 10*s.* to *Ward's* servant, and gave him a note subscribed by one *Wallis* a goldsmith, for 60*l.* payable to one *Freeman* or bearer, which the plaintiff's servant accepted. This transaction was about noon, and at that time *Wallis* was a solvent person, and continued paying his bills till night. Next morning

(b) 11 Mod. 241. But see *Fenner v. Meares*, 2 H. Bl. 1269. *contra*. This case, however, is doubted in 1 East Rep. 104. Per Lord *Kenyon*.

(c) Per Lord *Ellenborough*. 4 Esp. Rep. 204.

(d) 2 Ld. Raym. 928. 6 Mod. 36. 1 Salk. 442. & *Holt*, 120. S. C.

the plaintiff's servant coming with the note to receive the 60*l.* of *Wallis*, found that *Wallis* had stopped payment, and was become insolvent. Whereupon the plaintiff brought this action against the defendant for the 60*l.* note: it did not appear upon the evidence that the plaintiff was conusant of, or privy to this transaction of his servant, or had given him any authority to receive a note instead of money, or approved of it afterwards. And *Holt* Ch. J. said: "I am of opinion that an *indebitatus assumpsit* for monies received to the plaintiff's use lies properly in this case, and that this evidence is sufficient to maintain the plaintiff's declaration. For when the 60*l.* was indorsed on *Fellows's* bill, as so much actually paid by Sir *Stephen Evans* to *Fellows*, *Fellows* directing that sum to be paid to the plaintiff, and the defendant having the money in his hands, it amounts to a receipt of so much by the defendant to the plaintiff's use. No doubt the action were maintainable if the plaintiff had brought the note back again to the defendant, and though he did not, since it does not amount to actual payment, the plaintiff must recover." And *Powel* Just. said, "The delivery and acceptance of *Wallis's* note is no payment, for when a master sends his servant to receive money, he cannot accept a note in lieu of it. Perhaps, if the master had been there himself, he would have refused the note, as knowing the insufficiency of *Wallis*; and shall the servant oblige him to take such a note by his acceptance without his master's directions? Indeed if the master consents to it afterwards, that amounts to a previous command." Judgment for the plaintiff, *per totam curiam*.

So, in the case of *Israel v. Douglas* and another, (c) which was also an action of *indebitatus assumpsit* for money had and received. The material facts of this case were as follow: the defendants who were partners, were indebted to one *Delvallé*, a broker, in 64*l.* 9*s.* for brokerage, and *Delvallé* was indebted to the plaintiff in 40*l.* on a promissory note. *Delvallé* afterwards applied to the plaintiff, to lend him a further sum, which the plaintiff refused to advance without security; whereupon *Delvallé*, gave him an order on the defendants for the sum in which they were indebted to him (*Delvallé*) for brokerage. This order was sent by the plaintiff to the defendants in November 1787, with a request that they would acknowledge their having given him credit for it. The defendant *Douglas* answered, that they would pay the money which they owed to *Delvallé*, to no other person but the plaintiff, but objected to the amount of the sum contained in the order, which they desired to have rectified. Another order was then sent to them, which *Douglas* again objected to, promising at the same time to pay the plaintiff, what they really owed to

(c) 1 H. Bl. 239. 2 Sir W. Bl. Rep. 1269. this case is questioned. See also 1 East But see the case of *Taylor v. Higgins*, Rep. 104.
3 East Rep. 171. where the authority of

Delvallé, and requesting an order to pay or give credit to the plaintiff, for so much in their hands, as was in fact due to *Delvallé*. An order in this form was accordingly sent them, which they accepted; in consequence of which, the plaintiff advanced 70*l.* to *Delvallé*, who afterwards becoming a bankrupt, the defendant refused to pay the money to the plaintiff according to the order. On which refusal this action was brought; and at the trial, the plaintiff obtained a verdict; against which a rule was obtained to show cause, why it should not be set aside, and a new trial granted. But, after argument, all the judges of the court of Common Pleas (except Mr. Justice *Wilson*) were of opinion, that the evidence supported the count for money had and received. And Lord *Loughborough* Ch. J. said, "It has been contended, that the money was in point of fact owing by the defendants to *Delvallé*, that their undertaking was to him, that in reality no money was had and received by them to the use of the plaintiff. But *Delvallé* had paid for premiums on account of the defendants, which created a debt from them, and which he might have set off against any similar demand of theirs against him. This debt is, with the consent of the parties, assigned to the plaintiff. *Douglas* has due notice of it, and assents; by which assent he becomes, with his partner, liable to the plaintiff. He makes no objection to an order from *Delvallé* to pay his money to the plaintiff, but only to the amount of the sum paid. He insists that the whole demanded by *Delvallé* was not due, and therefore requires a looser order, on the faith that he would pay the balance: on his failure to pay, his promise attached, so as to make the defendants liable to an action. Then the question is, whether when *Israel* brings an action in his own name against the defendants, this shall not be considered as money had and received by them to his own use? Now when *Douglas* had admitted the money to be due, he was that moment estopped, at it were, from saying that it was not due. I also think the action might be maintained on the account stated: *Delvallé* gives an order to pay to the plaintiff a liquidated balance; the only dispute is concerning the amount of that balance. *Douglas* says, "I will pay you according to the sum which shall appear to be due." He is here again estopped from denying the effect of his promise. I am therefore of opinion that the verdict is right, and ought not to be set aside." And *Gould* Just. said "This case is like that of a man having money due to me in his hands, which I order him to pay to another. Now if I pay money to you for another person, it is money had and received by you to his use. But where is the real and substantial justice, whether I in fact pay money to you for a third person, or whether I give you an order to pay so much money, to which you expressly assent? In reason and sound law, it is money had and received to the use of such third person. If my debtor tenders me money, which I

give back to him, and tell him to pay to another, he then in point of fact receives money to the use of the other. But is there any real difference, between such a case and the present? As to the account stated, I think that count also, all the circumstances considered, comes within the fair compass of the case; but I have not the least doubt as to the count for money had and received." But *Wilson J. contra*, said, "It is highly necessary that the forms of actions should be kept distinct: courts of justice have, in my opinion, already gone quite far enough, in extending the favourite count, for money had and received. But I know of no case where they have gone so far as to allow that count to be maintained where no money has in fact been received by the defendant. Here it by no means appears that money was had or received by the defendants. I am also of opinion that this demand between the parties, being for brokerage, was from the nature of it, the subject of an action for work and labour. Now though it be true, that where a man is my debtor, he holds my money, yet I cannot accede to this as a general proposition, that whenever a man is my debtor, I am intitled to bring an action against him for money had and received. A taylor might, according to this rule, bring an action for money had and received against a man who had not paid him for a suit of cloaths. For my idea is, that where no money has been actually had and received, no action for money had and received can be supported. In the case of *Fenner v. Meares*, (g) money was in fact received by the defendants; there the action might clearly be maintained. So here it would have been proper, if it could be shown, that that money was received by *Douglas* to the use of *Devallé*." In the case of *Fenner v. Meares*, just referred to, it was determined, that this form of action lies by the assignee of a *respondentia* bond against the obligor, where the latter, by an indorsement made thereon engaged to pay the same to any assignee.

So, in the case of *Arden v. Rowney*, (h) where a check had been drawn by one *Alder* upon the defendant; and before the plaintiff would give cash for it, he sent his clerk to the defendant, and asked him if the draft was a good one? He said that it would be honoured, as he was in *Alder's* debt 200*l.*; the clerk then observed, that the check was post-dated, and could not therefore be recovered; the defendant said, that that did not signify, it would be of service to the poor man, and it should be paid. Lord *Ellenborough* Ch. J. before whom the cause was tried, ruled that this was an appropriation of 100*l.* part of the money which the defendant said he owed to *Alder*, amounting to 200*l.* and that the plaintiff might recover to that amount; upon which it was suggested by the defendant's counsel, that if it was to be taken that the

(g) Vide ante, note b.

(h) 5 Esp. Rep. 254.

plaintiff's right to recover was on the ground of the appropriation of the money in the defendant's hands, the plaintiff's right could not go beyond the money actually due by *Rowney* to *Alder*, and that, in fact, his saying there was 200*l.* in his hands was a mistake, and that he should show it was a small sum only. To which suggestion his lordship assented; and evidence was produced to show the real state of the accounts, which was proved to be a balance of 80*l.* and for which sum the plaintiff had a verdict.

4. OF MONEY RECEIVED AND PAID BY BANKERS AND OTHERS UPON OR IN RESPECT OF BILLS OF EXCHANGE, PROMISSORY NOTES, CHECKS, OR OTHER SECURITIES: AND IN WHAT CASES SUCH MONEY IS RECOVERABLE IN THIS FORM OF ACTION.

An action of *indebitatus assumpsit* lies for money had and received by the *bonâ fide* bearer of a note, payable to bearer, against the maker. Thus, in the case of *Grant v. Vaughan*, (i) in which the plaintiff declared first, upon an inland bill of exchange; and secondly, upon an *indebitatus assumpsit* for money had and received. The facts were as follow: the defendant, a merchant in *London*, gave a cash note upon his banker, to one *Bicknell*, a ship's husband, which note was dated, "*London*, 22d *October*, 1763," and directed to Sir *Charles Asgill*, with this request, "Pay to ship *Fortune* or bearer, so much;" *Bicknell* by some accident lost this note. The person who found it, or who at least was in possession of it, (however he might have obtained that possession) came four days after the note was payable in *London*, to the shop of the plaintiff, who was a tradesman at *Portsmouth*, and bought five pounds' worth of tea of him, and gave him this note in payment, desiring to have the change out of it; the plaintiff stept out to make enquiry who the defendant might be; and upon being informed that he was a very good man, and that it was his hand-writing, he readily gave the change out of the note, retaining the price of the tea. The defendant, upon being apprized that *Bicknell* had lost the note, sent notice to Sir *Charles Asgill* "not to pay it," and he refused accordingly; whereupon *Grant* brought the present action. And the court of *King's Bench* determined, that the plaintiff was entitled to recover upon the count for money had and received. Lord *Mansfield* Ch. J. said, upon the second count, the present case is quite clear beyond all dispute. For undoubtedly, an action for money had and received to the plaintiff's use, may be brought by the *bonâ fide* bearer of a note made payable to bearer. There is no case to the contrary. It was certainly money received for the use of

(i) 3 Bur. 1516.

the original advancer of it; and if so, it is for the use of the person, who has the note as bearer. In this case, *Bicknell* himself might undoubtedly have brought this action: he lost it, and it came *bonâ fide*, and in the course of trade, into the hands of the present plaintiff, who paid a full and fair consideration for it. *Bicknell* and the plaintiff are both innocent. The law is to determine which of them is to stand to the loss; and by law, it falls upon *Bicknell*."

So, money paid into a banking house for the purpose of taking up a particular bill, which was lying there for payment; though the banker's clerk said at the time that he could not give up the bill till he had seen his master; was held to be money had and received to the use of the then owner and holder of the bill, and could not be applied by the bankers to the general account of the acceptor who paid in the money. Thus, in the case of *De Bernales v. Fuller*, (k) where it appeared, that *Puller* had accepted a bill for 894*l.* 16*s.* 9*d.* payable at *Fullers'* banking-house, of which bill the plaintiff *De Bernales* became the holder, and sent it to his bankers, the *Newnhams*, to receive payment when due. By exchange of bills amongst the bankers, the bill in question was lodged by *Newnhams* with the *Fullers*, as the banking house where it was made payable. When the bill became due, *Puller's* clerk went to *Fullers*, and told their clerk whom he saw there, that he had brought the money to take up the bill, and he laid the money down upon the counter and demanded the bill. *Fullers'* clerk took up the money and kept it, but did not deliver up the bill, saying that he would first speak to *Fuller*; and the bill was not delivered up nor the money received by *Newnhams* for *De Bernales*. (There being, it seemed, some account between *Puller* the acceptor, and *Fullers* the bankers, which gave the latter, as they supposed, a lien upon this money.) Whereupon *De Bernales*, the owner of the bill, brought this action against the *Fullers* for money had and received to his use; considering the money as having been paid to and received by them for the use of the holder of the bill, whoever he might be, at the time when it became due. But at the trial, before Lord *Ellenborough* Ch. J. at Guildhall, his lordship thought that there was no privity proved between *De Bernales* and the *Fullers*, so as to sustain this action; considering that the evidence did not establish a receipt of this money for the intended purpose for which it was directed to be paid in, namely, to take up the bill; but rather a waiver of receiving the money for that purpose by the defendant's clerk, and a determination of the defendants to hold it for their own use; which made them wrongdoers; and therefore that the action should rather have been trover. And under this direction there was a verdict for the defendants. But afterwards a new trial was moved for, on the part of the plaintiff, or leave

(k) 14 East Rep. 590. n. a,

to enter a nonsuit. And the Court, after much discussion, made the rule absolute for a new trial; considering, as it appeared that the money having been expressly paid into the defendant's house for the specific purpose, declared at the time of taking up this bill; and that purpose not having been directly repudiated till afterwards, it must be taken to have been received at the time for the use of the holder of the bill.

But in the case of *Williams v. Everett*, (l) which was an action for money had and received, brought by the plaintiff to recover 300*l.*, being part of the amount of a bill of 1126*l.* 2*s.* remitted by one *James Kelly* from the *Cape of Good Hope* to the defendant's house, in a letter dated *Cape Town*, 8th *July*, 1809; in which *Kelly* says, "I remit you by the *Warley* 1126*l.* 2*s.*, which I particularly request you will order to be paid to the following persons, who will produce their letters of advice from me on the subject," &c. Amongst the persons, he named the plaintiff *Williams*, (Wine merchant, *Gracechurch Street*,) for 300*l.* And he afterwards made another remittance for 500*l.* on the same terms. And then he adds, "I desire the amounts paid each person to be put on the back of their respective bills, &c. And that every bill paid off be cancelled." *Williams* by his attorney, long before the bills became due, gave the defendant *Everett* notice of a letter he had received from *Kelly*, ordering his debt of 300*l.* to be paid out of that remittance, and offered him an indemnity of a banking house if he would hand over the bill to him; but *Everett* refused to indorse the bill away, or to act upon the letter; admitting, however, that he had received the letter directing the application of the money in the manner already stated. The question at the trial was, whether the plaintiff was entitled to receive from the defendants the amount of his demand on *Kelly* for 300*l.* out of the bill for 1126*l.* 2*s.* which was admitted to have been received by the defendants when it became due. The Court determined that the action could not be maintained. And *Ld. Ellenborough* Ch. J. in delivering the judgment of the Court said, "A point has been discussed in argument, which did not arise in this case at *nisi prius*; namely, on the effect of a foreign attachment laid on the money in the hands of the defendants; but as the nonsuit was pronounced independently of any such evidence, and before any proof of the foreign attachment was given or tendered, it is fit to consider the propriety of the nonsuit, without reference to such circumstance; it being our opinion, independently of that circumstance, that the nonsuit was right. The question which has been argued before us is, whether the defendants, by receiving this bill, did not accede to the purposes for which it was professedly remitted to them by *Kelly*, and bind themselves so to apply it; and whether, therefore, the amount of such bill paid to them when due, did not instantly become, by opera-

(l) 14 East Rep. 582.

tion of law, money had and received to the use of the several persons mentioned in *Kelly's* letter, as the creditors in satisfaction of whose bills it was to be applied, and of course, as to 300*l.* of it, money had and received to the use of the plaintiff. It will be observed, that there is no assent on the part of the defendants to hold this money for the purposes mentioned in the letter; but, on the contrary, an express refusal to the creditor so to do. If, in order to constitute a privity between the plaintiff and defendant as to the subject of this demand, an assent express or implied be necessary, the assent can in this case be only an implied one, and that too implied against the express dissent of the parties to be charged. By the act of receiving the bill, the defendants agree to hold it till paid, and its contents when paid, for the use of the remitter. It is entire to the remitter to give, and countermand, his own directions respecting the bill as often as he pleases, and the persons to whom the bill is remitted may still hold the bill till received, and its amount when received, for the use of the remitter himself, until, by some engagement entered into by themselves with the person who is the object of the remittance, they have precluded themselves from so doing, and have appropriated the remittance to the use of such person. After such a circumstance, they cannot retract the consent they may have once given, but are bound to hold it for the use of the appointee. If it be money had and received for the use of the plaintiff under the orders which accompanied the remittance, it occurs as fit to be asked, *when* did it become so? It could not be so before the money was received on the bill becoming due: and at that instant, suppose the defendants had been robbed of the cash or notes in which the bill in question had been paid, or they had been burnt or lost by accident, who would have borne the loss thus occasioned? Surely the remitter *Kelly*, and not the plaintiff and his other creditors, in whose favour he had directed the application of the money according to their several proportions to be made. This appears to us to decide the question; for in all cases of specific property lost in the hands of an agent, where the agent is not himself responsible for the cause of the loss, the liability to bear the loss is the test and consequence of being the proprietor, as the principal of such agent. The case of *De Bernales v. Fuller & Co.*, which has been urged in argument on the part of the plaintiff, is clearly distinguishable from the present by this circumstance, that the defendants in that case, i. e. *Fuller and Co.*, had antecedently received the bill, which was to be paid at their house, from *Newnham and Co.* the bankers of the plaintiff *De Bernales*, the holder, for the very purpose of receiving payment for them, the *Newnhams*, of such bill; and having taken the bill for this purpose, the Court thought that *Fuller and Co.* could not by themselves or their clerk renounce this purpose, but must apply the money brought by *Puller's* clerk specifically for the dis-

charge of that bill then lying at their house, to that very purpose and no other; and that they were in effect to be regarded in that case as the plaintiff *De Bernales'* agents, through the intervention of *Newnham's* house, for the purpose of that receipt, and could therefore hold and apply it to no other. Here no agency for the plaintiff ever commenced, but was repudiated by the defendants in the first instance. We are of opinion, therefore, that upon no principle of law can the defendants be said to stand in such privity in respect to the plaintiff, as that the 300*l.* claimed by this action can be said to have been money had and received to the plaintiff's use.

So, in the case of *Yates v. Bell*, (m) where a bill of exchange, payable at the house of A. had been there presented for payment and dishonoured; and the acceptor afterwards remitted to A. a sum of money for the purpose of enabling him to pay the dishonoured bill, and also another of less value; and A. in answer stated the fact of the bill having been dishonoured, but added, that the money received should be carried to the acceptor's account, and did afterwards pay the smaller bill. It was holden, that the holder of the original bill could not maintain an action against A., there being no privity between them. And *Abbott Ch. J.* said, "This case cannot, in principle, be distinguished from *Williams v. Everett*, and that case was properly decided. In *De Bernales v. Fuller*, the defendant was agent of *De Bernales* when he received the money, and never would have received it but for that character, and after that he could not repudiate that agency. That is the distinction between the two cases. Where a party, to whom a bill is remitted, repudiates the trust with which the bill is clothed, that may give to the person remitting the bill, a right to bring trover for it; but it does not give any right of action to the person to whose account the bill is directed to be applied; and unless some agreement had taken place respecting the bill between the defendants and the plaintiffs, the former could only be considered as holding the bill for the use of the acceptor."

So in the case of *Kilsby v. Williams*, (n) where the plaintiff paid into his own bankers, a cheque of 250*l.* drawn upon them by a third person, which they received without any objection; and in the course of the same day the drawer of the cheque paid in a sum of money, part of which he particularly appropriated, leaving a balance unappropriated of 237*l.* The bankers who were then creditors of the drawers to a large amount, wrote on the next morning to the plaintiff stating, that the cheque was not paid, but that they would keep it in the hope of there being money to pay it; and on that day a further unappropriated balance was paid in, making altogether a sum exceeding the plaintiff's cheque. It was determined that under these circumstances, the

(m) 5 Barn & Ald. 645.

(n) 5 Barn & Ald. 815.

plaintiff might maintain money had and received against the bankers; and that the latter, being his agents for receipt of the money, could not appropriate the balance to the payment either of their own general account against the drawer, or of two cheques presented on the same day, but subsequently to that of the plaintiff, and paid by them.

So, in the case of *Pierson v. Dunlop* and others, (o) where it was determined, that if the indorsee of a bill of exchange who has received a navy bill assigned to the drawee, as a security to him (the indorsee) till the bill of exchange is accepted, deposit such navy bill with the drawee, and the drawee receives the money upon it, he is answerable for the amount in an action for money had and received to the use of the indorsee, though he may have done nothing that amounts to an acceptance of the bill of exchange.

So, in the case of *Whitfield v. Savage*, (p) which was also an action of *indebitatus assumpsit* for money had and received. The circumstances of the case were as follow: A person of the name of *Dibdin* being in want of 50*l.* applied to the plaintiff for the loan of that sum, who gave him a bill for 55*l.* 6*s.* drawn by himself upon one *Thornton*, and accepted by the latter. *Thornton* had effects of the plaintiff in his hands to the amount of the bill. *Dibdin* indorsed the bill to the defendant, from whom he received the full amount, and the defendant indorsed it over to another person. The day before the bill became due, *Dibdin* took 50*l.* in part payment of his debt to the plaintiff, but soon after he had paid it into his hands, the plaintiff, in the presence of *Dibdin*, being informed that *Thornton*, the acceptor, was become insolvent, said "that it would be of no use for him to keep *Dibdin's* money as he should not like the bill to be returned upon him;" he therefore gave to *Dibdin* a check on his banker for 50*l.* (being the sum which he had just before received of him) desiring him to take it to the defendant: *Dibdin* accordingly gave the check to the defendant, together with 5*l.* 6*s.* of his own; to enable him to provide for the bill, telling him that *Thornton* had become insolvent, and was gone off. Four days after the bill had become due, the plaintiff having learnt from the defendant, that payment of the bill had not been demanded, desired him not to pay it, as no notice had been given by the holder, of its non-payment, and at the same time, promised to indemnify the defendant against the consequences of a refusal. Soon after this, the bill was brought to the defendant, who paid it notwithstanding the caution he had received from the plaintiff: whereupon the latter brought this action to recover the 50*l.* paid to the defendant, to enable him to provide for the bill.

The court of Common Pleas determined that the plaintiff was entitled to recover in this form of action. And Lord *Eldon* Ch. J. said: "With

(o) Cowp. 571.

(p) 2 Bos. & Pul. 277.

respect to the objection, that this action for money had and received, ought to have been brought by *Dibdin*, instead of the present plaintiff, it appears to me, that the action is well brought, for these reasons: the night before the bill became due, the plaintiff sent the money in dispute to the defendant, it was the plaintiff therefore that advanced it. It is true, indeed, that *Dibdin* being the person liable in conscience before either the plaintiff or defendant, had previously put 50*l.* into the plaintiff's hands; but as the money in dispute was actually sent by the plaintiff to the defendant, the former had a right to call upon the latter to restore it to him. As between the plaintiff and defendant the money may be considered as advanced by the plaintiff: and in what manner the plaintiff and *Dibdin* might settle between themselves, does not concern this defendant. I should think, as having actually advanced it, he had a right to recover it, even if, after the recovery, he held it as a trustee for *Dibdin*. In contemplation of law, the plaintiff has lost the value of his effects in the hands of the acceptor; and it is on that principle that notice of non-payment is required. In contemplation of law, he must ultimately have been the loser by the failure of the acceptor. He therefore deposited the money with the defendant to answer the bill if duly demanded. But when the holder was no longer entitled to enforce payment of the bill, the money so deposited must be considered as remaining in the defendant's hands, for the use of the plaintiff, and the defendant having taken upon himself to dispose of that money in payment of the bill, after notice to abstain from so doing, and after an offer of indemnity, is in law liable to answer to the plaintiff for the amount."

But a mere promise by a debtor to his creditor, that if he would draw a bill upon him, at a certain date for the amount of his demand, he should then have the money, and would pay it, does not amount in law to an acceptance of the bill when drawn: and an indorsee for a valuable consideration, between whom and the drawee no communication passed at the time of his taking the bill, can neither recover upon the count as for an acceptance of the bill, nor on the general counts as for money had and received, &c. (*q*)

So, where the drawee of a bill of exchange, upon its being presented to him by the indorsee, accepted the bill, and said, that he expected a remittance from the drawer in a few days, and that as he had a bill of the drawer in his hands which would be paid, he would take all risks; these circumstances do not amount to sufficient evidence to entitle the indorsee to recover against the drawee the amount of the bill on a count for money had and received, after failing to establish by evidence the special count upon the bill. (*r*)

So, in the case of *Stewart v. Fry*, (*s*) where A. accepts a bill, made

(*q*) *Jackson v. Collings*, 1 East Rep. 98.

(*s*) *Holt Ni. Pri.* 372. 1 Mo. 372. S.C.

(*r*) *Whitwell v. Bennett*, 3 Bos. & Pul.

payable at the house of the defendants, and which is indorsed to the plaintiffs, who discount it. The bill is presented to the defendants, when due, and dishonoured: two days afterwards the money to take up the bill is remitted to the defendants, and they are requested to *follow* it in whosoever hands it may be; they tender the money to the plaintiffs, who had sent back the bill the day before to the drawers. In the meantime, the defendants received an order from a house (to which the letter inclosing the remittance referred them for advice) to hold the money to the credit of that house, as they had by the desire of A., the acceptor, advanced him to the amount of the money then in the defendants' hands for the purpose of taking up the bill. It was holden, that this was a sufficient countermand of the money on the part of A., and that the defendants were not liable to an action for money had and received, brought by the plaintiffs on their *again* getting back the bill into their possession.

If A. pays money into a banker's for a specific purpose, and the banker's clerk, by mistake, pays this money to B., who has no right to it; A. cannot maintain an action against B. to recover it back. Thus, in the case of *Rogers v. Kelly*, (t) which was an action for money had and received to recover the sum of 130*l.* under the following circumstances: the plaintiff having indorsed a bill drawn by one L. C. for 130*l.* payable at Messrs. *Austin* and Co. and finding that it would not be honored by the acceptor, paid in this sum of money to the bankers for the purpose of retiring it. The defendant held another bill of exchange for the same sum, accepted by the same person, due the same day, and payable at the same place. The latter bill being presented for payment first, and no funds being provided to pay it, the banker's clerk, by mistake, gave the defendant the 130*l.* paid in by the plaintiff to satisfy the bill to which he had put his name. For the plaintiff it was contended, that as the money had been paid in for a specific purpose, and as the very money paid in had been given by mistake to the defendant, it was to be considered as *ear marked*, and might be followed by the person to whom it really belonged: but Lord *Ellenborough* Ch. J. said, "There is no privity between the parties to this suit. The plaintiff's claim is on the bankers, and they must seek their remedy against the defendant the best way they can. The plaintiff's money must still be considered as in the hands of the bankers; his account with them is the same as if this mistake had not been committed."

If a person discounts bills with a banker, and receives, in part of the discount, other bills not indorsed by the banker; and which bills turn out to be bad, the banker is not liable. Thus, in the case of *Fyde v. Clark*, (u) which was an action for money had and received: the

(t) 2 Campb. 128.

(u) 1 Esp. Rep. 447.

plaintiff had employed his brother *Richard Fyde* to discount certain promissory notes to the amount of 8000*l.* with the defendants, who were bankers, and they gave, in lieu of money, other notes and bills, but which they did not indorse, it not being their practice to indorse bills so given. Part of them, *viz.* to the amount of 4300*l.* turned out to be bad; and the present action was brought to recover this sum. But Lord *Kenyon* Ch. J., before whom the cause was tried, said, "If, in the discount, *Richard Fyde* took the bills and notes in question in lieu of money, he must be bound by it; for the bankers parted with them, supposing them to be good, and he took them under the same impression. Having taken them without indorsement, he has taken the risque on himself. They were the holders of the bills, and by not indorsing them, have refused to pledge their credit to their validity; and *Richard Fyde* must be taken to have received them on their own credit only. His Lordship concluded with observing, therefore, that the action could not be supported.

So, where A., residing at X., employs B., residing at Y., to procure payment of a bill there, and to remit the produce directed to him at X., and B. receives payment of the bill, but remits the produce to a third person at Z. for A.'s use, whereby the whole gets into the hands of A.'s creditors. A. cannot maintain an action for money had and received against B. to recover the amount of the sum received in payment of the bill. (v)

So, in an action for money had and received by the holder of a bill of exchange against a person who has received a sum of money from the acceptor to satisfy it, any defence may be set up which would have been available, if the action had been brought against the acceptor himself. (w)

So, where a sum of money has been lodged with a party to indemnify him against bills of exchange which he has accepted for the accommodation of another, an action will not lie against him to recover the money while the bills are outstanding, although the statute of limitations has run upon them. (x)

5. OF MONEY RECEIVED ON BANKERS' CHECKS, BILLS OF EXCHANGE, PROMISSORY NOTES, OR OTHER SECURITIES, EITHER POST DATED, OR WITH FICTITIOUS OR FORGED NAMES THEREON.

1. OF POST DATED CHECKS, &c.] — If a post dated check, upon being presented, is paid for the honor of the drawer in expectation of

(v) *Duncan v. Shipwith*, 2 Campb. 68.

(w) *Redshaw v. Jackson*, 1 Campb. 372.

See also *Baker v. Birch*, 3 Campb. 107.

(x) *Morse v. Williams*, 3 Campb. 418.

receiving funds from him ; but the holder knowing that the drawer, at the time of presenting the check, was insolvent, and that it was post dated, and therefore void, he is liable to refund the money so paid, in an action of *indebitatus assumpsit* for money had and received. Thus, in the case of *Martin v. Morgan*, (y) which was an action for money had and received under the following circumstances : the defendant had had accommodation-bill transactions with the firm of *Burmester & Co.*, and in the course of these transactions, a check on the plaintiffs for 995*l.* 15*s.* 7*d.* was given by *Burmester and Co.* to the defendants on the 9th of *February*, post dated for the 19th, to meet a bill falling due on that day. The defendants finding that *Burmester and Co.* were in bad circumstances, pressed them for 400*l.*, and threatened to present the check unless they received that sum. *Burmester and Co.* desired the defendants not to do this, telling them that they had no funds in the plaintiff's hands to meet such a demand. *Burmester*, in company with one of the defendants, then went to *Minet* for assistance ; and *Minet*, after inspecting the books of *Burmester and Co.*, told the defendants that *Burmester and Co.* were insolvent. One of the defendants then said, that he would wait till four o'clock, and unless he received 400*l.* from *Burmester and Co.* by that time, should present the check and expose them on 'Change. Instead of waiting till four, the defendants presented the check at a quarter after three, and obtained payment, the plaintiffs expecting to receive funds from *Burmester and Co.*, though they had not any in their hands at the time the check was presented. At 20 minutes before four, *Burmester and Co.* sent a notice to the plaintiffs not to pay any more on their account. The plaintiffs were wholly ignorant of *Burmester and Co.*'s insolvency, of the bill transactions between them and the defendants, and of the circumstance of the check being post dated. The Court were of opinion, that the plaintiffs were entitled to recover the money so paid to the defendants. And *Dallas Ch. J.* said, " As between the bankers and the defendants, what are the facts ? An illegal draft is presented : so illegal, indeed, that if the bankers had knowledge of such illegality, they would have been liable to a penalty of 100*l.*, (z) certainly if they had known that they would not have paid the bill ; they were therefore kept in the dark ; and by whom ? By the very parties who now seek to retain the money so unfairly obtained. Now, is there any case in which the Court will allow a party to take advantage of his own illegal act ? Undoubtedly the defendants have no means of meeting this objection to their claim ; but are they better entitled on the other ground ? It is urged, that the plaintiffs knew they had no funds of *Burmester, and Co.* ; but did they know, as the defendants did, that they would have none at four o'clock ? On the contrary, they had

(y) 1 Brod. & Bing. 289. 3 Mo. 635. (z) Vide 55 Geo. 3. c. 184. s. 12.
S. C.

every reason to expect an early remittance from *Burmester and Co.* The defendants knowing there would be no such remittance, and availing themselves of every advantage, hurry to the banking-house, and procure payment of the check. Knowing the draft to have been illegal, they cannot, in point of justice, have any claim to retain a sum obtained in such a manner." And *Richardson* Just. said, "The defendants knew that *Burmester and Co.* were in a state of probable insolvency, and concealed this from the plaintiffs, who were ignorant of it. This brings the case within the rule of law, that a party paying money in ignorance of circumstances with which the receiver is acquainted, is not on equal terms with him, and therefore entitled to recover it back."

2. OF MONEY RECEIVED ON BILLS, &c. WITH FICTITIOUS OR FORGED NAMES THEREON.] — The indorsee of a promissory note may maintain the like form of action against the maker, to recover the amount of a forged note, given in part payment. Thus, in the case of *Dimsdale v. Lancaster*, (a) which was an action of *indebitatus assumpsit* for money paid, and had and received; and on the trial, it appeared in evidence, that the defendant having given her promissory note for 63*l.*, it was paid into the hands of the plaintiffs, who were bankers; the payee having regularly indorsed it. The note was sent to the defendant by a notary for payment; and in payment of it, he received in part a 10*l.* note, which turned out to be a forgery: and to recover the amount of which the present action was brought. The counsel for the defendant objected, that the plaintiffs, being indorsees of the first note, ought to have declared thereon as indorsees, and given notice to the defendant to produce it upon the trial: and as the only dealing was through the medium of that note, there was no money of the plaintiffs had and received by the defendant. But Lord *Ellenborough* Ch. J., before whom the cause was tried, said, he thought the action was maintainable; for when a person has put his name to a promissory note, he thereby acknowledges that he has money in his hand of the payee of the note; and undertakes to pay it to whoever is legally entitled to receive it; that is, to the person who shall have paid for it a good consideration, and who has thereby become the legal holder of the note.

So, in the case of *Tatlock v. Harris*, (b) which was an action at the suit of the indorsee of a bill, payable to a *fictitious payee*, against the acceptor, who was also one of the drawers; the declaration contained counts for money paid, and for money had and received. It appeared upon the evidence, that the defendant was indebted to one of the indorsers, and sent him this bill, for which he was credited in account, and that the plaintiff paid that indorser the value of the bill: and upon a demurrer to the evidence, the Court of *King's Bench* held, that the

(a) 4 Esp. Rep. 201.

(b) 3 Term Rep. 174. See also 1 H. Bl. 313. & 569.

plaintiff was entitled to recover under the counts for money paid, and money had and received, and he had judgment accordingly. And in the case of *Vere v. Lewis*, (c) which was a similar action to the last, except that the defendant was not one of the drawers, and there was no evidence that he received any value for the bills; upon which it was urged the plaintiff could not recover upon the money counts: but the Court said the acceptance was evidence that he had received value from the drawers, and the plaintiff had judgment.

So, in *Bennett v. Farnell*, (d) where it was holden, that a bill of exchange made payable to a fictitious person or his order, is neither, in effect, payable to the order of the drawer, nor to bearer, but is completely void: and therefore if money, paid by the holder of such a bill as the consideration for its being indorsed to him, gets into the hands of the acceptor, it may be recovered back from him in an action for money had and received. And Lord *Ellenborough* Ch. J., in delivering his opinion upon the case, said, "I will admit any evidence of value having been received by the defendant. If *Bennett's* money has found its way to him, he shall not be allowed to retain it. In that case he has money drily in his hands belonging to another person; and it may be recovered from him as money had and received. But the bill being made payable to *George Abney* or order, the plaintiff cannot sue upon it, either as the mere bearer, or as indorsee of *Robert Abney*. Where a bill is payable to the order of a particular person, an order from this person must be shown by any one who would make title to the bill." And upon this case being afterwards brought before the Court of King's Bench, Lord *Ellenborough* Ch. J. observed, that he conceived himself bound by *Minet v. Gibson*, and the other cases upon this subject which had been carried up to the House of Lords, (though by no means disposed to give them any extension,) and that if it had appeared, that the defendant knew *George Abney*, the payee, to be a fictitious person, he should have directed the jury to find for the plaintiff.

So, where money has been paid upon a *forged* bill of exchange to a *bonâ fide* holder, who had given value for it, the money cannot be recovered back from him. This point was determined in the case of *Price v. Neale*, (e) where two forged bills of exchange, purporting to be drawn by *Benjamin Sutton* upon the plaintiff, who had effects of *Sutton's* in his hands, and therefore accepted them. These bills were indorsed to the defendant, and paid by the plaintiff when due. It afterwards turned out that the drawer's name had been forged, and the party hanged for the forgery. But that the defendant *Neale* acted innocently and *bonâ fide*, without the least privity or suspicion of the forgeries, and

(c) 3 Term Rep. 182.

(e) 3 Bur. 1354.

(d) 1 Campb. 130.; and see the several cases there cited in *notis*.

paid the whole value of the bills. Upon the trial, however, the jury found a verdict for the plaintiff, subject to the opinion of the Court of King's Bench upon this question,—"Whether the plaintiff, under the circumstances of this case, could recover back from the defendant the money he had paid on the bills, or either of them?" The Court were of opinion that the plaintiff was not entitled to recover back any part of the money he had so paid. And Lord *Mansfield* delivered his opinion as follows, "This is an action for money had and received to the plaintiff's use, in which action the plaintiff cannot recover the money unless it be against conscience in the defendant to retain it; and great liberality is always allowed in this sort of action. But it can never be thought unconscientious in the defendant to retain this money, when he has once received it upon a bill of exchange indorsed to him for a fair and valuable consideration, which he had *bond fide* paid, without the least privy or suspicion of any forgery. Here was no fraud, no wrong. It was incumbent upon the plaintiff to be satisfied that the bill drawn upon him was the drawer's hand before he accepted or paid it: but it was not incumbent upon the defendant to inquire into it. Here was notice given by the defendant to the plaintiff of a bill drawn upon him; and he sends his servant to pay it and take it up. The other bill he actually accepts; after which acceptance the defendant innocently and *bond fide* discounts it. The plaintiff lies by for a considerable time after he has paid these bills; and then found out that they were forged; and the forger comes to be hanged. He made no objection to them at the time of paying them. Whatever neglect there was, was on his own side. The defendant had actual encouragement from the plaintiff himself for negotiating the second bill, from the plaintiff's having, without any scruple or hesitation, paid the first; and he paid the whole value, *bond fide*: it is a misfortune which has happened without the defendant's fault or neglect. If there was no neglect in the plaintiff, yet there is no reason to throw off the loss from one innocent man upon another innocent man: but, in this case, if there was any fault or negligence in any one, it certainly was in the plaintiff, and not in the defendant."

But in the case of *Ancher and others v. The Governor and Company of the Bank of England*, (f) where it appeared that one Captain *Dahl*, a Dane, and resident in *Denmark*, being indebted to the house of *Claus Heide* and Co. in *London*, applied to one *Mæstue*, to procure him a bill in order to discharge the debt. *Mæstue* accordingly obtained a bill from the plaintiffs at *Christiana*, on *Claus Heide* and Co., with whom they had correspondence; which bill was as follows:—"Christiana, 17th January, 1778. Two months after sight, please to pay this our sole bill of exchange to Mr. *Jens Mæstue* or order, one hundred and twenty

(f) Doug. 637.

pounds sterling, value in account, and place it to account as per advice, from *Karon* widow of *Christian Ancher* and sons. To Messieurs *Claus Heide* and Co. of London." On this bill was written by *Mæstue* an indorsement in the *Danish* language of this import: "The within must be credited to Captain *Morten Larsen Dahl*, value in account. *Christiana*, 17th January, 1778. *Jens Mæstue*." And it was remitted to *Claus Heide* and Co. in the following letter:—"Agreeable to the desire of Captain *Morten Larsen Dahl* of *Arendall*, I have inclosed for his account sent you *Karen Ancher* and son's bill on yourselves for 120*l.*, which you will, on receipt, be pleased to credit his account with, and advise him of the same."—The bill was received by *Claus Heide* and Co., and accepted, and they gave notice to the plaintiffs and to *Dahl* that they had received it and placed it to his account. Afterwards a forged indorsement in *English* was written upon it, as follows:—"For me to pay Mr. *Detleff D. Muller* or order. "*Morten L. Dahl*." *Muller*, who was a clerk in the house of the acceptors, carried the bill thus indorsed, but which never had been in the hands of *Dahl*, to the Bank, and indorsed it with his own name; upon which it was discounted in the ordinary course of business. When the day of payment came, the acceptors having become insolvent, and *Muller* having absconded, the bill was protested; and one *Fulberg*, as a friend or agent for the plaintiffs, came to the Bank and paid it for their honor as the drawers; but the forgery having been discovered, this action for money had and received was brought against the Bank, on the ground that the bill was not negotiable on account of the special indorsement, and that it had, therefore been discounted by the Bank in their own wrong, and the money paid by *Fulberg*, to take it up, paid in mistake. Lord *Mansfield*, before whom the cause was tried, directed a nonsuit; but the case was afterwards brought before the Court of King's Bench, on a motion for a rule to set aside the nonsuit, and for a new trial, which was made absolute.* And Lord *Mansfield* said, "The ground of the nonsuit was, that the purpose for which the bill was drawn was answered, it having been applied to the credit of *Dahl*, and he having acquiesced. It therefore occurred to me, that the drawers had received no injury, and had no interest: but (which was not attended to at the trial,) there has been a second payment for the honor of the plaintiffs; and it is contended that a consideration has arisen on that second payment. Where there is equal equity, possession must prevail; and the equity is equal between persons who have been equally innocent, and equally diligent. The question therefore is, whether the Bank has been equally diligent. A bill, though once negotiable, is certainly capable of being restrained. I remember this being deter-

* *Buller* Just., however, dissented from the determination of the Court on this case.

mined upon argument. A blank indorsement makes the bill payable to bearer; but by a special indorsement, the owner may stop the negotiability. *Maestue* did so here. It does not seem to me that, after the special indorsement by *Maestue*, *Dahl* himself could have indorsed it over. *Maestue* did not mean to make himself answerable as an indorser, or to enable *Dahl* to raise money on the bill. The Bank could not have maintained an action on the bill against the plaintiffs: it was their negligence not to read the special indorsement."

So, in *Smith v. Mercer*, (g) which was an action for money had and received. And, at the trial, it was proved, that the plaintiffs were bankers in London, with whom *Maurice Evans* kept cash; the defendants were bankers at Tunbridge, and were *bonâ fide* holders for a valuable consideration, paid by them to *Peter Le Souef*, of a bill of exchange, drawn on the 15th of Feb. 1811, by *Thomas Temple*, at 65 days' date, on *Maurice Evans* for 120*l.* payable to the drawer's order, and indorsed by *Temple* and *P. Le Souef*. The bill, when it came to the defendant's hands, appeared to be thus accepted: "*Smith, Payne, and Smiths, Maurice Evans.*" This acceptance was forged. Before the bill was due, the defendants indorsed the same, and sent it with their indorsement thereon to their corresponding bankers and agents in London, *Spooner* and Co., to be received for them at maturity. Upon the bill being presented by *Spooner* and Co. to the plaintiffs for payment on the 23d of April, when it became due, they immediately paid the amount to *Spooner* and Co., who paid the amount in account to the defendants; all the parties being at the time equally ignorant of the forgery. The plaintiffs sent the bill to *Evans* at the usual time, with the other vouchers of payments made for him, and *Evans* immediately returned the same to them as forged, and refused to allow the payment thereof, as a payment made on his account. The plaintiffs on discovering the forgery, on the 30th of April 1814, gave notice to the defendants that the acceptance was forged, and required the defendants to repay the money, which they refused to do. The Court determined, that the plaintiffs could not recover from the defendants the amount which they had thus paid him on the forged acceptance, upon the ground that if the acceptance had been genuine, and the plaintiffs had refused payment, the defendants had their remedy against the supposed acceptor; or if they failed to obtain the amount from him, they had their remedy against the prior parties on the bill. The acceptance carried with it an order on the bankers of the supposed acceptor to pay the money: it purported to be an order of *Evans*, whose bankers the plaintiffs were. It was incumbent on them to see to the reality of that order before they obeyed it; and if, by obeying it, they are sufferers, they ought not to throw on another a loss accruing

(g) 6 Taunt. 76.

without fault of his. But Mr. Just. *Chambre* differed from the majority of the Court, and was of opinion that the plaintiffs were entitled to recover, upon the ground, "that the money was paid without any consideration, and under a mistake; and not only under a mistake, but under a representation made to the plaintiffs by the defendants, who indorsed the bill with that forged acceptance on it; that the plaintiffs were required and directed so to pay it by the person whose agents they were in money transactions." But in the case of *Crockford v. Winter* (h) it was held, that where money was obtained under a forged certificate of a marriage, it may be recovered back in this form of action: and it is no answer that the defendant was really entitled to the money, if such right depended upon a question not of common law jurisdiction.

6. OF MONEY RECEIVED BY OR FROM AGENTS, SERVANTS, AND OTHERS, ACTING FOR THEIR PRINCIPALS.

If money be received by an agent for the use of his principal, and he refuses to pay it over, an action of *indebitatus assumpsit* for money had and received lies against him at the suit of his principal. (i) So, where agents in *England* effect a policy of insurance for a correspondent abroad, on which a loss happens, and he draws a bill upon them, which is presented to them for acceptance by the indorsee; upon which they say, that they cannot accept it, having no funds in hand; but that on a settlement with the underwriters it shall be paid; and after this the agents receive from the underwriters a sum less than the amount of the bill: It was determined, that the money so received might be recovered from the agents by the indorsee, as so much money had and received to his use. (k)

So, where goods were consigned to two for sale by commission; but, upon a dissolution of partnership, the commission to sell was assumed by one: it was holden, that he who sold was rightly sued for the amount sales in an action of *indebitatus assumpsit* for money had and received; which form of action could not have been maintained against them both; although they might have been both sued jointly in an action for not accounting. (l)

A share in the *London Institution*, incorporated by charter, for the advancement of literature, &c. cannot be transferred until the proprietor shall, *by writing under his hand*, signify his desire so to do to the committee of managers, and mention therein *the name*, &c. and other description of the person to whom he is desirous the same should be transferred, which person is to be approved by the committee: a note was

(A) 1 Campb. 124.

(i) *Videt tit. Principal and Agent, Part III.*
post.

(k) *Langston v. Corney*, 4 Campb. 176.

(l) *Wells v. Ross*, 7 Taunt. 403.

accordingly addressed to them in these words: "Having disposed of my share in the *London Institution* to (leaving a blank for the name), I beg leave to recommend him to be elected in my place, as a proprietor," &c. and signed by the proprietor; which note was left in the hands of an agent, (the clerk of the society,) for the purpose of selling the share. It was holden, that this did not authorise such agent to fill up the blank himself with the name of the purchaser with whom he contracted for the price, against the rules of the society, which require the recommendation of the candidate to be vouched by the proprietor himself, inserting his name, &c. in the paper: and consequently the agent had no authority before the transfer was so completed, to receive the money of the purchaser, and to insert his name in the blank unknown to the proprietor; and such purchaser having paid the money before the time of payment arrived, viz. when the transfer from the proprietor was complete, pays at his own risk to the agent, whom he thereby makes his own for that purpose. And such agent afterwards absconding with the money, and the society disallowing the transfer upon the interference of the proprietor; it was determined, that the purchaser could not recover the amount, from such proprietor, in an action for money had and received. (m)

So, a book-keeper in *Smithfield* market, receiving money for beasts sold there, is liable to pay such money to the owner of the beasts, and cannot apply it in payment of a debt due to him from the salesman. Thus, in the case of *Goode v. Jones*, (n) which was an action of *assumpsit* for money had and received. The plaintiff, a grazier in the country, had sent three oxen by *Cooke*, his drover, to *Smithfield* market to be sold by a salesman there. *Holbeach*, the salesman, employed the defendant as his book-keeper, and he was also employed by several other salesmen. On the evidence it appeared, that it was the business of the book-keeper to receive the money from the purchaser, and keep an account of the beasts sold, distinguishing what each beast was sold for, and to whom it belonged. When that is done, the salesman sends an order to the book-keeper, desiring him to pay the money to the drover. In the present case, *Holbeach*, the salesman, being indebted to the defendant, he refused to pay the money received for the plaintiff's cattle to him, insisting that he had a right to retain the money received by him on that account, to satisfy the debt due to him from *Holbeach*. *Holbeach* became insolvent, and the plaintiff brought the present action. It was contended by the counsel for the defendant, that there was no privity between the plaintiff and the defendant, the defendant kept his account with *Holbeach* only, and the plaintiff could only call on him for the money. This is much like the case of a banker: if a sum of money is

(m) *Parnther v. Gaiskell*, 13 East Rep. 432. (n) *Peake's Cas. N.P.* 177.

paid into his hands for the use of a factor, it will never be contended that the principal may maintain an action against him. He also offered to call witnesses to prove that by the universal custom of the market, the book-keeper was considered as the debtor of the salesman, and not of the grazier, with whom he had no connexion. But Lord *Kenyon* Ch. J. said, "By the common law of the land the plaintiff is entitled to receive this money from the defendant, and no custom whatever can deprive him of it. There is not the least similitude between the case of a banker and the present defendant. No privity whatever exists between the banker of a factor and the principal, whom he never heard of, but this defendant knew that he was receiving this money for the use of the plaintiff; he entered his name in his book, and distinguished how much was due to him." The jury found a verdict for the plaintiff.

If money be paid by mistake to an agent, expressly for the use of his principal, and the agent has paid it over, he is not liable in an action, by the person who mispaid it; because it is just that one man should not be a loser by the mistake of another; and the person who made the mistake is not without redress, but has his remedy over against the principal. On the other hand it is just, that as the agent ought not to lose, he should not be a gainer by the mistake. And, therefore, if after the payment so made to him, and before he has paid the money over to his principal, the person corrects the mistake; the agent cannot afterwards pay it over to his principal, without making himself liable to the real owner for the amount. (o)

If an agent pays money of his principal which ought not to be paid, it may be recovered back by an action of *indebitatus assumpsit*, either at the suit of the agent or his principal. (p)

So, where a broker having a lien on certain policies of insurance effected for his principal, for whom he had given his acceptances, the defendant promised that he would provide for the payment of those acceptances as they became due, upon the plaintiff's giving up to him such policies, in order that he might collect for the principal the money due thereon from the underwriters; which was accordingly done, and the money was afterwards received by the defendant: it was determined, (q) that this was not a promise for the debt or default of another within the statute of frauds; and that the plaintiff might recover against the defendant, as well for the breach of agreement in not providing for the payment of the acceptances, as also upon a count for money had and received.

So, in *Cox v. Prentice*, (r) where it appeared, that the plaintiffs were

(o) *Buller v. Harrison*, Cowp. 566. 806.
See also *Sadler v. Evans*, 4 Bur. 1984.;
and see *Str.* 480. and 3 Esp. Rep. 253.

(p) Cowp. 806. Doug. 637. Bul. N.P. 35.

(q) *Castling v. Aubert*, 2 East Rep. 325.
(r) 3 Maule & Sel. 344.

gold refiners, and the defendant was a watchmaker, and had a correspondent at *Gibraltar*, from whom he was in the habit of receiving broken metal. His correspondent remitted to him a bar of silver, which he carried to the plaintiff's house; and they melted it down in his presence. The plaintiffs afterwards procured it to be assayed by a third person, who was paid by the defendant; and the plaintiffs paid to the defendant 88*l.* and a fraction, the supposed value of the silver, according to the assay-master's certificate. The defendant informed his correspondent of what had been done, and credited him in his account with the amount. The plaintiffs sold the silver to a house in *Birmingham*, who afterwards returned it, representing that it did not answer the assay; upon which the plaintiffs applied to the defendant for a return of the money, offering to return him the silver; but the defendant refused to return the money, on the ground that he had forwarded his account to his correspondent, in which he had credited him with the full sum. It appeared, however, that the account was still unsettled between them. The assay-master proved that he received a small piece of the silver for the purpose of assaying it; and he by his assay made the whole 4 oz., whereas 2 oz. 7 dwts. was the true assay. A verdict was found for the plaintiffs for the difference in value between the supposed and true weight, with liberty to the defendant to move for a nonsuit. A rule *nisi* was accordingly obtained upon two grounds; 1st, that the action would not lie, even supposing it to have been brought against the defendant's principal; 2dly, supposing it would lie against his principal, yet it would not against the defendant, who was merely an agent, and whose situation had been altered between the time of the sale and the action, by his having accounted for the sale money with his principal. But the Court determined, that the verdict was right, and *Le Blanc* Just. said, "The circumstance of the account between the defendant and his principal being still open without any new credit given, does, I think, dispose of the objection upon the 2d ground. That brings it to the principal question. Now upon that, as a general proposition, it may be true, that when an article is sold which turns out to be of less value than the price given for it, the extra price, if there be no fraud, cannot be recovered back. But that is a rule applicable only to cases where the thing is of an arbitrary value; and the fallacy lies in applying the rule of law to this case when the thing is not of an arbitrary value, but depends upon the quantity of silver it contains. It is just like the case of a purchase of any commodity by weight, the price of which is to be fixed by the weighing; and if the weight turns out to be less than that paid for, can there be a doubt that the party selling is bound to refund? So here the price was to be fixed by the quantity of silver to be ascertained by the assay of the assay-master."

But in the case of *Tenant v. Mackintosh*, (s) where it appeared, at the trial, that the plaintiff had sent out goods to be sold by the defendant at *Calcutta*, with directions to remit the proceeds either in specie, or in a return-cargo, the nature of which, and the prices to be given for the articles were particularly pointed out by a letter of instructions. The return-cargo which was sent did not correspond with these instructions, but the plaintiff did not repudiate it within a reasonable time. That question was left to the jury. It appeared, however, that the return-cargo had been consigned to Messrs. *Blanchard* and *Wilson*, who were desired to sell and to hold the proceeds to the order of *Mackintosh*, the latter having a lien upon the cargo to the amount of about 4000*l*. *Blanchard* and *Wilson* accordingly sold the cargo, and paid thereout the money due to the defendant; the residue, amounting to 415*l*., remained in their hands, and was admitted to be due to the plaintiff. A verdict having been found for the defendant generally, a motion was afterwards made for leave to enter a verdict for the plaintiff for the sum of 415*l*. upon the count for money had and received: the plaintiffs' counsel contended that the cargo having been consigned to *Blanchard* and *Wilson*, to be held by them at the order of the defendant, they must be considered as his agents, and then the money in their hands was, in point of law, money had and received by *Mackintosh*, to the use of the plaintiff. But the Court refused the motion, and said, "It does not appear from the circumstances in this case, that *Blanchard* and *Wilson* are so far identified with the defendant, as that the money in their hands can be considered as money had and received by the defendant. They are, in fact, the agents of both parties: of the defendant, for the purpose of protecting his lien upon the cargo; and of the plaintiff for the purpose of paying over the remainder of the proceeds after the defendant's lien has been satisfied. There is therefore no ground for entering a verdict for the plaintiff for 415*l*., his remedy for that being against *Blanchard* and *Wilson*."

7. OF TRUST MONEY RECEIVED; AND IN WHAT CASES THE SAME IS RECOVERABLE BY ACTION OF *ASSUMPSIT*.

An action of *indebitatus assumpsit* for money had and received will not lie to recover back a sum paid upon trust, for a specific purpose, unless it be shewn that the trust is closed, and that a balance remains in the hands of the trustee. Thus, in *Case v. Roberts*, (t) which was an action for money had and received, where it appeared that the plaintiff had paid 50*l*. into the hands of the defendant, for the purpose of conducting an action for a breach of promise of marriage, brought by a relation of

(s) 4 Barn. & Ald. 594.

(t) Holt's Ni. Pri. Cas. 500.

the plaintiff. The payment of the money was proved, and also a letter of the defendant's, in which he gave an account that he had expended the money in a journey to *Bristol* for the purposes of the cause. The plaintiff's counsel then contended that the defendant ought not to have gone to *Bristol*; that it was not necessary for the action; and that he was not authorized to go there: the defendant's account was also falsified in some particulars. For the defendant it was insisted that the present action could not be maintained. It was said, if money is advanced, and the purpose for which it is advanced fails, an action lies to recover it back: but this was in substance a trust: an action of account might lie, or the plaintiff might go into a court of equity; but money had and received could not be maintained. The defendant has furnished an account, and discharged himself by it; if he has been guilty of a breach of trust, the plaintiff must have recourse to another tribunal. *Burroughs* Just., before whom the cause was tried, said, "If money is paid into the hands of a trustee for a specific purpose, it cannot be recovered in an action for money had and received until that specific purpose is shewn to be at an end. The action for money had and received must not be turned into a bill in equity for the purpose of discovery. If the plaintiff show that the specific purpose has been satisfied; that it has absorbed a certain sum only, and left a balance; such balance (the trust being closed) becomes a clear and liquidated sum, for which an action will lie at law. Whilst the matter remains in account, and is charged with the specific trust, the action for money had and received will not lie."

But where the trustees under a marriage-settlement of stock, the dividends of which they covenanted to permit the bankrupt to receive for his life, executed after his bankruptcy, a power of attorney to A. to receive the same. A. received the dividends, and paid them over to the wife of the bankrupt, save one sum, which he paid to one of the trustees: it was determined, that the assignees might recover the total amount of such dividends from the trustees, in an action for money had and received, inasmuch as the whole of the money had been virtually received by the trustees after full notice of the bankruptcy. (u)

8. OF THE PRODUCE OF AN ADVENTURE IN THE SOUTHERN WHALE FISHERY BETWEEN A CAPTAIN AND HIS CREW, SOLD BY THE OWNER AS THEIR AGENT: AND OF THE SEAMEN'S REMEDY TO RECOVER THEIR INDIVIDUAL SHARES BY ACTION FOR MONEY HAD AND RECEIVED.

In the case of *Evans v. Bennett*, (v) which was an action of *indebitatus assumpsit* for seamen's wages, and for money had and received and

(u) *Allen v. Impett*, 8 Taunt. 265. See ant's name is stated to be *Imlett* instead of *Impett*.
Holt's Cas. 641, S.C., but where defend-

(v) 1 Campb. 300.

brought for the plaintiff's proportional share of an adventure in the southern whale fishery, in a ship called the *Mary Sherball*; and it appeared in evidence, that by certain articles of agreement, under seal, between the captain of the ship, and the plaintiff, together with the other mariners, it was agreed that they should serve faithfully during the voyage out and home; that if any of them deserted, they should forfeit all benefit from the voyage; that the cargo should be sold six weeks after the ship returned; or if not sold, should be valued, when each mariner should receive that proportion of the net proceeds marked against his name; that the defendant as owner of the ship, should be nominated their agent to dispose of the cargo for the benefit of all parties concerned; and that the officers and seamen should receive a proportional share of all prizes taken during the voyage. For the defendant it was objected, that the action had been misconceived, and that the plaintiff should have declared specially on this agreement. There was clearly no sum of money due as wages; for the plaintiff, according to the usual way in fishing voyages to the south seas, was to receive a share of the produce of the cargo, and was in fact a partner in the adventure. Nor could he recover this share as money had and received to his use; as there had been no liquidation of accounts, and no acknowledgment of any sum being due to him. For the plaintiff it was submitted, that he was entitled to recover under the count for money had and received. But *Mansfield* Ch. J. said, "There is no doubt that the plaintiff would here be obliged to prove that he did his duty on board the ship; but the count for money had and received (to which alone we can look,) gives no hint of this, and affords no sort of information as to the nature of the demand. The plaintiff claims a certain proportion of the proceeds of a voyage, in consideration of having done his duty as a mariner, according to the stipulations of an agreement entered into between him and the captain of the ship. Ought he not then to have declared upon this agreement? The cargo may have been sold by the defendant; but its produce, as soon as received, does not become money in his hands appropriated to the use of the mariners. If it can be proved that he has admitted that the plaintiff did his duty properly during the voyage, and that he is entitled to a share of the proceeds, money had and received may do; otherwise I think there should have been a special declaration." But no evidence of this kind being offered, his lordship directed a nonsuit.

9. OF MONEY RECEIVED EITHER UPON THE SALE AND PURCHASE OF LANDS, HOUSES, FIXTURES, GOODS, CATTLE, &c. OR IN RESPECT OF SOME ACT TO BE DONE, OR BENEFIT TO BE DERIVED; OR UPON THE SALE OF ANNUITIES: WHERE THE CONTRACT HAS EITHER BEEN RESCINDED, DISAFFIRMED, OR NOT PERFORMED, AND THE CONSIDERATION HAS FAILED. IN WHAT CASES THE MONEY SO RECEIVED MAY BE RECOVERED BACK BY ACTION OF *INDEBITATUS ASSUMPSIT*.

In a former part of this work (w) we have seen that a contract may be rescinded or put an end to by the mutual agreement of the contracting parties; and that it may be disaffirmed either where an option is reserved in the contract, or where the contract has not been performed, and there has been a failure of the consideration. But, in order to disaffirm a contract, and treat it as determined, both parties must be placed in the same situation as they were before the contract was made. (x) Now when a contract has been thus rescinded or disaffirmed, and money has been previously paid thereon by way of deposit, and in part of the purchase money, either to the vendor himself, or to his agent or auctioneer, such money may be recovered back by action of *indebitatus assumpsit*. But if the contract cannot be rescinded or disaffirmed, and it continues open or executory, this form of action will not lie; the proper remedy being either by special action of *assumpsit* upon the contract for the money agreed to be paid, or for general damages; or by bill in equity for a specific performance. (y) These distinctions will be seen throughout the cases on this subject, which I now propose to consider under the following subdivisions, namely, first, of money paid by way of deposit upon a contract for the sale of lands, houses, &c.; secondly, of money paid upon the sale of cattle, goods, &c.; thirdly, of money paid in consideration of some act to be done or other benefit to be received, but which has failed; and lastly, of money received on the sale of annuities, where a good title cannot be made, or where the deeds have been set aside or put an end to by agreement or otherwise.

1. OF MONEY PAID BY WAY OF DEPOSIT UPON A CONTRACT FOR THE SALE OF LANDS, HOUSES, FIXTURES, &c. WHICH HAS BEEN RESCINDED OR DISAFFIRMED BY REASON OF SOME MISDESCRIPTION OF THE PREMISES, OF FOR WANT OF MAKING OUT A VALID TITLE, OR REFUSING TO EXECUTE A PROPER CONVEYANCE, &c.] — If a contract is made for the sale of lands or houses either by public or private contract, and a deposit, or other sum of money is paid thereon; and it afterwards appears

(w) Part I. c. 2. s. 3.

(x) Ante, 39.

(y) Vide 1 Term Rep. 156. Doug. 23.

24. n. 8. Cowp. 818. 2 Bur. 1010. Sugden's Vendor and Purchaser.

that any material misrepresentation or improper description has been made of the premises either by the vendor himself, or by his agent or auctioneer employed to sell, the vendee may disaffirm the contract, and recover back the money so paid by action of *indebitatus assumpsit*. Thus, in the case of the *Duke of Norfolk v. Worthy*, (z) which was an action of *indebitatus assumpsit* for money had and received to recover back a deposit upon a contract for the sale of an estate which was advertised for sale, as consisting of 486 acres of land situate between *London* and *Brighton*, being about one mile from *Horsham*, four from *Crawley*, &c. And among other conditions of sale, was the following: "If through any mistake the premises should be improperly described, or any error or mis-statement be inserted in this particular, such error shall not vitiate the sale thereof, but the vendor or purchaser, as the case may happen, shall pay or allow a proportionate value according to the average of the whole purchase money as a compensation either way." The sale was to have taken place by auction on the 21st of *December*; but on the 15th of the same month, a written agreement was entered into between *J. Richardson* on the behalf of the defendant, and *J. Harting* who then appeared as a principal, whereby the defendant was to convey the premises to *Harting* on or before the 20th of *January* following, for 1575*l.* to be paid to *Richardson* on the execution of the conveyance; and for the true performance of the agreement, *Richardson* and *Harting* bound themselves to each other in the penalty of 500*l.* A deposit was then paid by *Harting* to *Richardson* of 300 guineas. The deposit being paid, *Harting* intimated for the first time, that he had not purchased the estate for himself, but for the *Duke of Norfolk*. Various steps were afterwards taken for carrying the agreement into execution; but on the 19th of *January*, *Harting* informed *Richardson*, that the *Duke* would not complete the purchase, as the estate, instead of being only one mile from *Horsham*, was between three and four. This fact being now clearly established, the plaintiff's counsel contended, that it constituted a material variance from the particular; so that the contract of sale was vitiated, and the deposit was recoverable as money had and received. For the defendant it was objected, that the action ought to have been brought in the name of *Harting*. He alone appeared as purchaser on the face of the agreement, and until after it had been executed and the deposit paid, the *Duke of Norfolk's* name had not been mentioned. *Harting*, therefore, was to be considered as the principal. Against him only, and not against the *Duke*, an action to recover the penalty would have lain had a proper conveyance been tendered and refused. But Lord *Ellenborough* Ch. J. said, "On the agreement, *Harting* only may be liable; but the question here is, whose money was paid as a deposit? If it was

(z) 1 Campb. 337.

the money of a principal paid through the medium of an agent, it may be recovered back by the principal, upon the contract, under which it was paid, being rescinded. I therefore think that the action is rightly brought in the name of the present plaintiff." It was then urged on the part of the defendant, that as there was evidence of only a part of the deposit being paid over to *Worthy*, the action would not lie against him, but ought to have been brought against *Richardson*. And he relied upon the case of *Burrough v. Skinner*, (a) where it was held, that the auctioneer is liable for the deposit where the bidder has sufficient reason not to proceed. But his lordship held, that if proof were necessary that the money had been paid over to the defendant, the evidence given would be insufficient. The deposit is not to be split into portions, and *Richardson* would still be considered as the depository. But it seems to make no difference, whether it was actually paid over or not. *Richardson* here acted completely as the agent of the defendant. Therefore, when the deposit was lodged with the agent, this was in law *eo instanti* a payment to the principal." The defendant's counsel then addressed himself to the merits of the cause, and insisted, that the effect of the misdescription was saved by the condition, which provided that no error or mis-statement should vitiate the sale. But Lord *Ellenborough* said, "In cases of this sort, he should always require an ample and substantial performance of the particulars of sale, unless they were specifically qualified. Here there was a clause inserted, providing that an error in the description of the premises should not vitiate the sale, but an allowance should be made for it. This he conceived was meant to guard against unintentional errors; not to compel the purchaser to complete the contract if he had been designedly misled. His lordship therefore left it to the jury, whether this was merely an erroneous mis-statement, or the mis-description was wilfully introduced to make the land appear more valuable from being in the near neighbourhood of a borough town. In the former case the contract remained in force; but in the latter case the plaintiff was to be relieved from it, and was entitled to recover back his deposit." And the plaintiff obtained a verdict accordingly. The defendant, however, afterwards moved for a new trial, both on the ground that the action should have been brought in the name of *Harting*, and that it should have been brought against *Richardson*; but the Court were of opinion, that the deposit was to be considered the money of the Duke of *Norfolk*; and that being paid to the agent of the defendant, it was money had and received by the latter to the plaintiff's use.

A contract to make a good title, means a title good both at law and in equity. This was determined in the case of *Maberley v. Robins*, (b) which was an action for money had and received, brought to recover

(a) Post. 308.

(b) 5 Taunt. 625.

back the deposit paid by the plaintiff upon the purchase of a house, in consequence of an objection taken to the title. *Lady Fane*, the proprietor, devised it to certain trustees, in trust for *Lady Read*. The devisees in trust conveyed the premises for 6690*l.* to *Thomas Read*, who declared a trust of the premises for *Lady Read*, one of the persons equitably entitled under the will of *Lady Fane*. *Thomas Read* was willing to convey, so that the legal estate might be well vested in the purchaser; but the purchaser insisted on the concurrence of those in whom *Lady Read*'s equitable interest had since vested, and who were now infants. There was no count for interest of money. The jury found a verdict for 1800*l.* the deposit, and 75*l.* interest. The defendant moved the Court to enter a nonsuit, urging, that though the objection taken to the title might be a strong one in a court of equity, yet, that inasmuch as it was only an equitable objection, the plaintiff must resort thither to avail himself of it. That this Court could no more go into the consideration of equitable objections to the title in this action, than they could on the trial of an ejectment. The title is confessedly good at law: the Court of Chancery interferes on the very ground that a title is good at law; and if that Court sees reason to grant relief, it decrees a re-conveyance. The Court, however, determined that the plaintiff had a right to recover the deposit, but without interest. And *Gibbs* Ch. J. said, "It has been determined, that if parties resort to a court of law for their judgment on a title to a real estate, they must be content with the judgment of the court of law; and if that Court says the title is good, the party who comes for the judgment of the Court shall be bound by it, however doubtful the point; and shall not afterwards refuse the purchase because it was a doubtful title: but the doctrine has never been carried to the extent the defendant now contends for. Here is a contract to make out a good title. If that contract be a contract to make a good title both in law and in equity, and the contract is brought before this Court, we must collaterally look to see whether the title be good in equity as well as in law. It is true, we sit here only as a Court of law, to administer the legal rights which arise out of the contract; but one of those rights is, to have a title good in equity. (c) See to what a length the defendant's doctrine would proceed! If a deed appeared on the abstract, whereby lands were conveyed to A. and his heirs, to the use of B. and his heirs, in trust for C. and his heirs, it would prove that a good title at law was made out in B. and his heirs, to convey, without the concurrence of C."

So, if an estate is sold by auction, and the vendor does not shew a clear title by the day specified in the conditions of sale, the purchaser

(c) But see the case of *Alpass v. Watkins*, 8 Term Rep. 516. where it was determined, that the deposit money cannot be recovered back if the vendor has a good legal title, and that the Court will only take notice of the legal estate.

may recover back his deposit, and rescind the contract without waiting to see whether the vendor may ultimately be able to establish a good title or not: nor is a purchaser bound to accept a doubtful title. And where it was an objection to a title that it was doubtful whether the wife of a party to a deed thirty years old was barred by that deed of her dower, it was not answered, by proving at the trial, that she was then dead; such proof not having been before given. (d) It is a sufficient objection to a title, that a person under whom the vendors claim, held, during his seisin of the estate, a newly-created office under the crown, (that of commissioners of *Dutch* property,) in which he was directed by statute to pay the surplus (after certain charges answered) of the proceeds of certain sales in the *Bank of England*, there to remain subject to such orders as the king in council should give thereon, and that his accounts with the crown were yet unliquidated.*

So, where the assignees of a bankrupt sell an estate under a commission of bankruptcy which is not valid, for which reason the purchaser disaffirms the contract, he is entitled to recover back his deposit, even though a new commission is afterwards sued out under which a good title may be made. Thus, in the case of *Bartlett v. Tuchin* and another, (e) where it appeared that the defendants, as assignees of a bankrupt, had contracted for the sale of his copyhold lands, and received a deposit. The commission was afterwards superseded; and another commission issued, and the same assignees were chosen; but the plaintiff had disaffirmed his contract pending the old commission; it was held, that he was entitled to recover back his deposit, though under the last commission a valid title might have been made.

So, in the case of *Burrough v. Skinner*, (f) which was an action of *indebitatus assumpsit* for money had and received by the defendant, who was an auctioneer; and in that character he had sold to the plaintiff an interest in land, for which the plaintiff had paid him a deposit of 50*l.*, but, upon an objection to the title, and the want of disclosure of certain circumstances, which ought to have been disclosed at the time of the bidding, the plaintiff disaffirmed the contract and brought the present action. And the Court were clearly of opinion, that the action was properly brought against the auctioneer: They said, "the money does not appear to have been paid over by him to his principal: but if it had been so, yet the objection appears to have been made before it either was or ought to have been so paid over. He was a stakeholder, a mere depository of the 50*l.*, and ought not to have parted with it till such time as the sale should have been finished and completed; and it should appear, in the event, to whom it properly belonged."

It has also been ruled by Lord *Kenyon* Ch. J. that where the auctioneer

(d) *Wilde v. Fort*, 4 Taunt. 374.

* *Ibid.*

(e) 6 Taunt. 258.

(f) 5 Bur. 2639.

does not disclose the name of his principal at the time of sale, and the contract is not performed, he is personally liable not only for the deposit, but also for loss of interest, and for damages and expenses. (g) So, where an estate is sold by auction, and in the printed conditions of sale, there is a statement and warranty of the title, the premises shall be taken to be sold under such title; and no verbal declarations of the auctioneer at the time of the sale shall be admitted to contradict the printed conditions. Thus in the case of *Gunnis and others v. Erhart*. (h) The plaintiffs were trustees for the sale of a copyhold estate, which was sold by auction. In the printed conditions of sale, the premises were stated to be "*free from all incumbrances*;" the defendant bid for them, and they were knocked down to him; but on discovering that there was a charge on the estate of 17*l. per annum*, he refused to complete the purchase. At the trial, the counsel for the plaintiffs offered to give in evidence, that the auctioneer had publicly declared in the auction room, when the estate was put up, that it was charged in the manner above specified. But Lord *Loughborough* Ch. J. refused to admit such evidence; and the plaintiffs were nonsuited. And upon a motion to set aside this nonsuit, the Court of Common Pleas were clearly of opinion, that the evidence was not admissible, as it would open a door to fraud and inconvenience, if an auctioneer were permitted to make verbal declarations in the auction room contrary to the printed conditions of sale; and no proof was offered that the defendant had any particular personal information given him of the incumbrance in question.

So, in the case of *Edwards v. Hodding*, (i) where an attorney who was also an auctioneer, received a deposit on property which he had sold by auction; and after queries raised on the title, and before they were cleared, paid over the deposit to his principal. On a demand of the deposit by the vendee, he answered that his principals would not consent to return it, and would enforce the contract. The Court held, that the buyer might recover the deposit from the auctioneer as money had and received to the plaintiff's use. And *Chambre Just.* said, "This is not an absolute payment by the plaintiff to the defendant as the vendor's agent, but a conditional payment; or, as it is more properly called, a deposit. The defendant receives it, knowing the condition, that there should be a good title; and he knows that that condition is not performed, he nevertheless takes on himself, with this knowledge, to pay over the money, which he was not warranted in doing; and therefore the judgment must be for the plaintiff."

An auctioneer is not liable to pay interest upon a deposit kept in his

(g) *Hanson v. Roberdeau*, Peake's Cas. 120. Vide 12 Ves. 352. 484.

(h) 1 H. Bl. 289.

(i) 5 Taunt. 815.

hands during the investigation of a title; for he is to be considered as a mere agent, unless he specially engage as a principal in the sale. Thus, in the case of *Lee v. Munn*, (k) where it appeared, that the plaintiffs had purchased property at a sale, conducted by the defendant as an auctioneer. The plaintiffs were the highest bidders, and the lot was declared to be theirs; and they signed an agreement to complete the purchase, according to the conditions of sale. They likewise paid into the hands of the defendant 200*l.* as a deposit, and a security for their performance of the contract. Objections being taken to the title deeds, a long negotiation commenced between the vendor and vendee; and from the year 1813, when the property was first put to auction, until the year 1817., different treaties had been carried on and arrangements proposed. Finally, however, the contract was rescinded; and the plaintiffs now brought an action against the defendant to recover the amount of the deposit money, together with interest from the time of its having been paid into the hands of the auctioneer, and the expenses which the plaintiffs had been obliged to incur in investigating the title to the property. The defendant had paid the amount of the deposit into court. For the plaintiffs it was contended, that they had not only a right to recover the interest of the money, but the expenses of investigating the title. Interest was due in all cases where the sum sought to be recovered was liquidated, and was detained in the hands of the receiver beyond the period when it ought to have been paid. At least it was competent for a jury to calculate interest in the amount of damages. But *Gibbs* Ch. J. said, "I cannot think that an auctioneer, who does not mix himself as a principal in the transaction, but merely receives a deposit to hold upon the condition, that in case the purchase be completed, he shall pay such deposit to the vendor, and if it be not completed, he shall return it the vendee, is to be charged with interest. I know of to no case to this effect; and I am sure the practice is the other way. As to the expenses of investigating the title, they are foreign to the case. The auctioneer is not liable to pay them. But the question of interest being new, I will reserve it for the opinion of the Court." The question was accordingly brought before the Court; and after argument, they declared that the plaintiff was not entitled to interest.

And in the case of *Flureau v. Thornhill*, (l) where the defendant, the vendor, in an action of *indebitatus assumpsit* for money had and received paid into court the deposit money, with interest: the Court of Common Pleas determined that the plaintiff, the vendee, could not recover any damages for the loss of his bargain. Therefore, where the vendee has been put to expense, and has incurred any particular loss or damage in consequence of the vendor's not making a good title, such expense and

(k) Holt. N. P. Cas. 569. 8 Taunt. 45. S. C. (l) 2 Bl. Rep. 1078.

damage may be recovered against the vendor by action of *assumpsit*, stating the contract, the breach, and the damages, &c. specially. (m)

Where a purchase is made which consists of several lots of houses, if, from the nature of the contract, it be entire, the vendor must make a complete title to the whole, otherwise the vendee may rescind the contract, and recover back his deposit by action of *indebitatus assumpsit* for money had and received. Thus, in the case of *Chambers v. Griffiths* and others, (n) which was an action of *indebitatus assumpsit* for money had and received brought to recover back the amount of a deposit made by the plaintiff on a sale by auction of several houses of the defendant's. And the case in evidence was, that the houses in question had, with several others, been put up by public auction in distinct lots; the plaintiff had bid for three of these lots, which had been knocked down to him; and he had paid the deposit for them required by the conditions of sale. One of the conditions was, that the purchaser was to have a good title made to him within a month after the sale. Within the month the defendant sent an abstract of the title, but it was to one of the houses only. The plaintiff insisted upon having a title made to him for the other two houses, or of rescinding the agreement for the whole purchase. The defendants were willing to suffer the plaintiff to abandon his purchase of the two houses to which they had not sent an abstract, but insisted on holding him to his agreement for the house to which they had shown a good and sufficient title. The plaintiff refused these terms, and brought his action to recover back the whole of the deposit money. The defendants had paid into court the amount of the deposit paid to them for the two houses. The question therefore was, whether the plaintiff had a right to consider the contract as at an end, or to recover his deposit for the house to which the defendants had made a title, the defendants having failed in making any title to the others. Lord *Kenyon* Ch. J. said, "When a party purchases several lots of this description, at an auction, it must be taken as an entire contract; that is, that the several lots are purchased with a view of making them a joint concern. The seller, therefore, shall not in case of any defect of his title to one part, be allowed to abandon that part at his pleasure, and to hold the purchaser to his bargain for the residue. From such a doctrine much injustice might result, as the part to which the seller could not make a title might be so circumstanced that, without it, the other parts would be of little, or perhaps of no value; or it might leave it in the power of the seller, or any other person who might come to the possession of such part, to deprive the purchaser of every degree of

(m) Vide *Richards v. Barton*, 1 Esp. Rep. 268. *Canfield v. Gilbert*, 4 Esp. Rep. 223. (n) 1 Esp. Rep. 150.

enjoyment or beneficial use of that part which he had purchased :” and his lordship added, “ That a case under circumstances precisely similar to the present, had been decided before him, when he was master of the rolls ; that, on that case coming before him, he had found that his predecessor there, Sir *Thomas Sewell*, had ruled contrary to the doctrine he was now delivering, but that he at the rolls had over-ruled Sir *Thomas Sewell*’s determination with the general approbation of the bar. In the present case, therefore, as the defendant had failed in making any title to the two lots in question, the plaintiff had by law a right to rescind the agreement as to the whole, and, of course, to recover his deposit.”

But in the case of *Joseph Johnson v. John Johnson*, (o) where trustees under a will sold to the plaintiff, (he being one of the trustees, and also one of several legatees,) *two parcels of land*, by private contract, for *two distinct sums of money*, with the consent, and by the express agreement of all the legatees, who were respectively entitled to equal shares of the purchase money, and which were duly paid to them : but after the contract had been thus far carried into execution, and after the purchaser was in possession of the land, it was discovered that there was some defect of title to one of the parcels, and, in consequence of which, an ejectment was brought by the person claiming title, and he recovered ; and the plaintiff, who had paid the purchase money, but to whom no conveyance had been made, was not only evicted from the possession, but was obliged to refund the rent and profits of that particular parcel of land. Several of the persons interested consented to repay their proportions of the purchase money ; but some (among whom was the present defendant) refused ; and the question was, whether, under these circumstances, the plaintiff was entitled to recover his proportion in an action of *indebitatus assumpsit* for money had and received, and retain possession of the other piece of land ? The Court of Common Pleas were of opinion that the plaintiff was entitled to recover against the defendant his proportion of the purchase money in this form of action, and also to retain possession of the other piece of land : and Lord *Alvanley* Ch. J., in delivering the opinion of the Court, said, “ If the question were, how far the particular part of which the title has failed formed an essential ingredient of the bargain, the grossest injustice would ensue if a party were suffered in a court of law to say that he would retain all of which the title was good, and recover a proportionable part of the purchase money for the rest. Possibly the part which he retains might not have been sold unless the other part had been taken at the same time, and ought not to be valued in proportion to its extent, but according to the various circumstances connected with it. But a court of equity may inquire into all the circumstances, and may ascertain how far one part

(o) 3 Bos. & Pul. 162.

of the bargain formed a material ground for the rest, and may award a compensation, according to the real state of the transaction. In this case, however, no such question arises: for it appears to me that, although both pieces of ground were bargained for at the same time, we must consider the bargain as consisting of two distinct contracts; and that the one part was sold for 300*l.* and the other for 700*l.* It has not been suggested that they were necessary to the occupation of each other. It amounts therefore to no more than this; that the plaintiff being one of the executors, who were about to sell the house, and also to sell the land, to both of which the legatees undertook to make a good title, advanced his money to the legatees on the purchase of these two lots, and now seeks to recover back the money for one of them, because the title to that has proved defective. In the present case, the plaintiff never has had any title conveyed to him; and therefore we are of opinion, notwithstanding the party sued is a legatee, that the plaintiff has paid his money under a mistake; consequently, the rule adopted in courts of law in such cases applies to him, and entitles him to recover that money from the party to whom it has been paid, in an action for money had and received."

If, however, there be but *one* contract, it cannot be rescinded by one of the parties for the default of the other, unless both of them can be put *in statu quo* as before the contract. Thus, in the case of *Hunt v. Silk*, (*p*) which was an action of *indebitatus assumpsit* for money had and received. The facts were these:—On the 31st *August*, 1802, an agreement of that date was made between the parties, whereby the defendant, in consideration of 10*l.* to be paid at the time of executing the lease after mentioned, and for other considerations therein stated, agreed that, within ten days from the date thereof, he would grant to the plaintiff a lease of a certain dwelling-house, for nineteen years (determinable by the plaintiff in five, ten, or fifteen years), from the 29th of *September* then next (but possession to be, immediately given to the plaintiff,) at the yearly rent of 63*l.* And the defendant also agreed, at his own expense, to make certain alterations in the premises, and that the premises, fixtures, and things should, at the time of executing the lease, be put in complete repair: and the plaintiff, in consideration thereof, agreed to accept the lease at the rent, and in the manner aforesaid, and to execute a counter-part, and pay the rent. The plaintiff took immediate possession of the premises under the agreement, and paid the 10*l.* at the same time, in confidence that the alterations and repairs stipulated for would be done within the ten days; but that period after having elapsed, and nothing being done, notwithstanding several applications to the defendant to perform the work, the plaintiff quitted the house, giving the defendant

notice of his having rescinded the agreement in consequence of the defendant's default, and brought this action to recover back the money he had paid. But the Court of King's Bench were of opinion, that the plaintiff could not, under the circumstances of this case, rescind the contract, and declare in this general form of action. And Lord *Ellenborough* Ch. J. said, " Without questioning the authority of the case of *Giles v. Edward*, (q) (which was cited by the counsel for the plaintiff) which I admit to have been properly decided, there is this difference between that and the present; that there, by the terms of the agreement, the money was to be paid antecedent to the cording and delivery of the wood; and here it was not to be paid till the repairs were done, and the lease executed. The plaintiff there had no opportunity, by the terms of the contract, of making his stand, to see whether the agreement were performed by the other party before he paid his money, which the plaintiff in this case had: but instead of making his stand, as he might have done, on the defendant's non-performance of what he had undertaken to do, he waved his right, and voluntarily paid the money, giving the defendant credit for his future performance of the contract, and afterwards continued in possession, notwithstanding the defendant's default. Now where a contract is to be rescinded at all, it must be rescinded *in toto*, and the parties put *in statu quo*. But here was an intermediate occupation, a part execution of the agreement, which was incapable of being rescinded. If the plaintiff might occupy the premises two days beyond the time when the repairs were to have been done, and the lease executed, and yet rescind the contract, why might not he rescind it after a twelvemonth on the same account? This objection cannot be gotten rid of: the parties cannot be put *in statu quo*."

Where money is paid by way of deposit on a contract for the sale of *leasehold* premises; and, upon examining the vendor's title, it should appear that he has a less term of years to come than what is mentioned in the agreement, or his title be otherwise defective, the purchaser may consider the contract at an end, and bring an action for money had and received, to recover back his deposit. Thus, in the case of *Farrer v. Nightingal*, (r) which was an action of *indebitatus assumpsit* for money had and received. The facts are reported as follow:—" The defendant being possessed of a public house, the plaintiff entered into a treaty with him for the sale of his interest; and a written agreement was accordingly entered into between the plaintiff and the defendant, which recited that the defendant was possessed of an interest in a public-house of which eight years and a half were to come; and that the plaintiff had contracted and agreed for the purchase of the interest and good will of the same, for a certain sum of money therein mentioned. The plaintiff paid

(q) Vide post. 323.

(r) 2 Esp. Rep. 639.

a deposit of 5*l.* to the defendant, on signing the agreement; but afterwards, upon looking into the defendant's title, it appeared that he had an interest to come in the premises of but six years only, and not of eight years and a half, as stated in the agreement; upon which the plaintiff refused to accept the assignment, and brought the present action to recover the deposit money." And for the defendant it was objected, that as there had been a written agreement between the parties, the plaintiffs should have declared on it, and should not be permitted, in this action, to go into parol evidence of the matters contained in it; which matters were necessary to the support of the plaintiff's action. But Lord *Kenyon* Ch.J. said, "I have often ruled, that where a person sells an interest, and it appears that the interest which he pretended to sell was not the true one; as, for example, if it was for a less number of years than he had contracted for to sell, the buyer may consider the contract as at an end, and bring an action for money had and received to recover back any sum of money he may have paid in part performance of the agreement for the sale; and though it is said here that, upon the mistake being discovered in the number of years of which the defendant stated himself to be possessed, he offered to make an allowance *pro tanto*, that makes no difference in the case; it is sufficient for the plaintiff to say, that is not the interest which I agreed to purchase. The plaintiff's action is well brought."

So, in *Adams v. Fairbairn*, (s) which was an action brought to recover a deposit of 39*l.* paid by the plaintiff upon the purchase of a lease of a public-house which was put up to sale by a public auction. The plaintiff declared on a special agreement, and also for money had and received. Upon the production of the supposed agreement, it appeared to be unstamped; but it had not been signed by either of the parties, or by the auctioneer as their agent. *Abbott* Just., before whom the cause was tried, was of opinion, that the plaintiff might still be entitled to recover on the count for money had and received. It afterwards appeared, that in order to complete the title, it was necessary to procure the execution of an assignment of the lease by one *Allen*; and that the lease itself was in the hands of the brewer, who had supplied the former tenant with beer, and who had a lien upon it for the amount of his debt. The learned judge intimated that it was incumbent on the defendant to show that an assignment of the lease, executed by *Allen*, had been tendered to the plaintiff when he demanded his money. The counsel for the defendant submitted, that since the money had been paid on the ground of a contract between the parties, it could not be recovered whilst the contract was in force, and until default made by the defendant: he was ready to prove that the parties were on the spot ready to assign the

(s) 2 Stark. 277.

lease, on the payment of the remainder of the purchase money by the plaintiff; and he contended that the payment of the money, and the assignment of the lease were concurrent acts, and that neither of the parties was bound to execute his act the first; it was sufficient if each of them was ready to perform his own part of the engagement. It appeared in evidence, that the parties had met in order finally to conclude the business, and that the plaintiff's attorney attended to pay the remainder of the purchase money: it also appeared that *Allen*, at the request of *Fairbairn*, had attended in town for the purpose of executing the assignment, but that in fact no assignment had been either tendered or executed. His Lordship, however, was of opinion, that it was incumbent on the defendant to prove, that an assignment had been executed. He said there was no contract between the parties in evidence, since the statute of frauds required that such a contract should be in writing, and since no assignment appeared to have been tendered, the jury were directed to find a verdict for the plaintiff, which they accordingly did for the amount of the deposit."

So, in the case of *Elliott v. Edwards*, (t) where a leasehold estate was put up to sale by public auction, and the plaintiff became the purchaser, and paid a deposit of 20*l. per cent.* in part of the purchase money, and signed an agreement for payment of the remainder on or before the 2d of February, 1802, on having a good title, when possession would be given. But upon investigating the title, it appeared, that the assignee of the lessee had not paid the whole of the purchase money for the assignment; and that there was a proviso in the assignment, not to assign without licence of the lessee, the purchaser therefore refused to complete the purchase, and brought this action to recover the deposit. And the Court of Common Pleas held, that the non-payment of the purchase money by *Johnes* was a sufficient objection to the title, and that the plaintiff might recover back his deposit in this form of action.

It is a general rule, that in an action for money had and received, to recover back a deposit made upon a sale, on the ground of a defect of title, the party bringing the action must prove the title bad, and it will not be sufficient to show, that the title has been deemed insufficient by conveyancers, who have been employed to advise upon it. This was settled, in the case of *Camfield v. Gilbert*, (u) which was an action of *assumpsit* for money had and received, brought to recover the sum of 50*l.* which was the deposit paid by the plaintiff, on the purchase of an estate in *Kent*, contracted to be sold by the defendant to the plaintiff; the plaintiff contending that the title was bad; and that he was entitled to recover his deposit. At the trial, before Lord *Ellenborough* Ch. J., the counsel for the plaintiff, after having stated that opinions of different

(t) 5 Bos. & Pul. 181.

(u) 4 Esp. Rep. 221. 3 East Rep. 516. S. C.

conveyancers had been given on the title before the completing of the purchase, who were of opinion that the title was defective, and ought not to be taken by the plaintiff, asked his lordship whether it might not be sufficient for him to rely on the fact of such conveyancers, advising the party not to complete the purchase? or whether it was necessary for him, on the part of the plaintiff, to go into the title, to show that it was defective, in order to entitle him to recover the deposit, as being paid on a bad and defective title. But Lord *Ellenborough* Ch. J. said, "The plaintiff's right to recover the money deposited depended on the defect of the title of the defendant to the premises, which he had contracted to sell; and unless it was a bad title he had no claim to recover. It would be therefore necessary for him to show that the title was bad."

In the case of *Bree v. Holbeck*, (v) where a personal representative having found among the papers of his testator, a mortgage deed, and having assigned it for upwards of six years for the mortgage money, affirming and reciting in the deed of assignment, that it was a mortgage deed made or mentioned to be made between the mortgagor and mortgagee for that sum; it was decided, that the assignee could not recover back the mortgage money, although it should turn out that the mortgage was a forgery, and that the assignee did not discover the forgery, till within six years before he brings his action, unless the assignor knew it to be a forgery. Lord *Mansfield* Ch. J., in this case, said, "The question is, whether there has been any fraud? Now, here every thing alleged may be true, without any fraud on the part of the defendant. He is an administrator with the will annexed, who finds a mortgage deed among the papers of his testator, without any arrears of interest, and parts with it *bonâ fide*, as a marketable commodity. If he had discovered the forgery, and had then got rid of the deed as a true security, the case would have been very different. He did not covenant for the goodness of the title, but only that neither he nor the testator had incumbered the estate. It was incumbent on the plaintiff to look to the goodness of it."

But, where a person, supposing himself the legal representative of a lessee for years, sold the term and delivered the lease, but without any assignment or formal conveyance, saying the premises were his, and if any thing happened he would see the vendee righted: it was determined, that the vendee might maintain an action against the vendor for the purchase money, where the rightful administrator of the tenant for years, had ousted the plaintiff by ejectment. Thus, in the case of *Cripps v. Reade* (w) which was an action of *assumpsit* for money had and received, to recover a sum of 40 guineas, which had been paid by the plaintiff to the defendant for the purchase of a leasehold estate. The

(v) Doug. 654.

(w) 6 Term Rep. 606.

defendant claimed the estate in question as administrator to *Mary Bartlett*, who had taken out letters of administration to her husband, the former possessor of the estate, under the name of *Caleb Bartlett*, his real name being *Carey Bartlett*. On the sale, the lease itself was delivered to the plaintiff, but there was no assignment or other conveyance from the defendant; but a conversation took place between them, in which the latter said, "that the premises were his right and property to do as he liked with, and if any thing happened he would see the plaintiff righted." Afterwards *John*, the nephew of *Carey Bartlett*, took out letters of administration to him by the right name, and recovered possession of the premises by ejectment. At the trial it was contended, on the part of the defendant, 1st, that no action lay to recover the purchase money, on the authority of *Bree v. Holbeck*, (x) where under circumstances of a similar nature the principle of *caveat emptor* was held to apply. But 2dly, If any action could be maintained, it could only be on the special warranty. But *Lawrence Just.*, before whom the cause was tried, overruled the objections, and directed a verdict to be found for the plaintiff, with liberty for the defendant to move to enter a nonsuit. A motion for that purpose was accordingly made: but the Court of King's Bench refused the rule: and Lord *Kenyon* Ch. J. said: "I do not wish to disturb the rule of *caveat emptor* adopted in *Bree v. Holbeck*, and in other cases, where a regular conveyance was made, to which other covenants were not to be added; for in general, the seller only covenants for his own acts, and for those of his ancestor, in which respect the case of a mortgage differs from it, as a mortgagor covenants that at all events he has a good title: but here the whole passed by parol, and it proceeded on a misapprehension by both parties that the defendant was the legal representative of the lessee, though it turned out afterwards that he was not. As therefore the money was paid under a mistake, I think that an action for money had and received will lie to recover it back. In the case cited no action at all could have been maintained."

So, in the case of *Robinson v. Anderton*, (y) which was also an action for money had and received. And at the trial it appeared, that the plaintiff had succeeded the defendant in a public-house, and had paid him for some fixtures which belonged to the lessor, and which were scheduled in the lease, and for which the plaintiff was obliged to pay the lessor. The defendant had been an under-tenant, and had paid the person of whom he rented the house for these fixtures. The action was brought for the amount of the sum paid by the plaintiff to the defendant: and it was contended, on behalf of the defendant, that this action could not be maintained, he having paid for them to a former tenant;

(x) *Ante*, 317.

(y) *Peake's Cas. N. P.* 94.

and therefore did not commit any fraud on the plaintiff. But Lord Kenyon Ch. J., before whom the cause was tried, said, "This action imputes nothing fraudulent to the defendant; his title is disaffirmed; for it appears he has received money which he had no right to, and which he must therefore return. He may recover back the money from the person to whom he paid it."

2. OF MONEY PAID UPON THE SALE OF CATTLE, GOODS, &c.] Where, by the terms of the contract, it is left in the power of one of the contracting parties to rescind it, and he does so; or where both parties mutually assent to its being rescinded; and money has been received upon the contract, it may be recovered back by action of *indebitatus assumpsit*: but if the contract continue open, the plaintiff cannot declare in this general form of action, but must state the contract and breach specially. (z) Thus, if A. sell a horse to B. and agree that if he dislikes and re-delivers the horse to C. he should repay the money, otherwise A. himself would, upon re-delivery of the horse to C., an *assumpsit* lies by B. against A. for money received to his use. (a)

So, in the case of *Towers v. Barrett*, (b) which was an action of *indebitatus assumpsit* for money had and received: and on the trial it appeared, that the suit was instituted by the plaintiff to recover ten guineas, which he had paid to the defendant for a one horse chaise and harness, on condition to be returned in case the plaintiff's wife should not approve of it, paying 3s. 6d. *per diem* for the hire of it. This contract was made by the defendant's servant, but his master did not object to it at the time. The plaintiff's wife not approving of the chaise, it was sent back at the expiration of three days, and left on the defendant's premises, without any consent on his part to receive it. The hire of 3s. 6d. *per diem* was tendered at the same time, which the defendant refused, as well as to return the money. It was objected, that an *indebitatus assumpsit* for money had and received would not lie; but that the action should have been on the special contract. The Court, however, determined that the action for money had and received was maintainable; for the condition was to return the chaise if not approved of; therefore the moment it was returned, the contract was at an end, and the defendant held the money against conscience, and without consideration. Buller Just. said, "The distinction between those cases where the contract is open, and where it is not so, is this: if the contract be rescinded, either as in this case, by the original terms of the contract, where no act remains to be done by the defendant himself, or by a subsequent assent by the defendant, the plaintiff is entitled to recover back his whole money; and then an action for money had and received will

(z) Vide 1 Term Rep. 136.

(b) 1 Term Rep. 133.

(a) 3 Lev. 364. Com. Dig. tit. Action of *Assumpsit*, A. 1.

lie. But if the contract be open, the plaintiff's demand is not for the whole sum, but for damages arising out of that contract. In a case before me on a warranty of a pair of horses to Dr. *Compton*, that they were five years old, when in fact they turned out to be only four, and they were not returned within a certain time, I held that if the plaintiff would rescind the contract entirely, he must do it within a reasonable time, and that as he had not rescinded the contract, he could only recover damages; and then the question was, what was the difference of the value of horses of four or five years old? so that the difference in cases of this kind is this: where the plaintiff is entitled to recover his whole money, he must show that the contract is at an end; but if it continue open, he can only recover damages, and then he must state the special contract, and the breach of it."

But in the case of *Weston v. Downes*, (c) which was also an action for money had and received; and at the trial before Lord *Mansfield*, the plaintiff proved that the defendant, in consideration of seventy guineas, had sold him a pair of coach horses, which he undertook to take back, if the plaintiff should disapprove of them, and return them within a month; the plaintiff did return them within a month, but took another pair from the defendant in their stead, without making any new agreement. These he also returned within a month, and received a third pair on the 23d of *December*, without any fresh bargain. This third pair he disapproved of, because they were restive, and would not draw, and offered to return them on the 5th of *January*, but the defendant refused to take them back. Upon this evidence his Lordship directed a nonsuit; and, on a rule to show cause why the nonsuit should not be set aside, and a new trial granted, the question was, whether the action of *assumpsit* for money had and received would lie in this case? The Court were of opinion that the contract continued open; and the plaintiff's only remedy was by special *assumpsit* upon the warranty, and not *indebitatus assumpsit* for money had and received; and that it resembled the case of *Power v. Wells*, (d) where the plaintiff gave a horse of his own and twenty guineas for a horse of the defendant's, which was warranted sound, but proved to be unsound; upon which the plaintiff, after tendering a return, as mentioned in the last case, brought the action for money had and received for the twenty guineas, and also an action of trover for his own horse. The Court held that neither would lie: not the latter action, because the property had been changed.

So, where the seller of a horse had warranted it sound; and in a subsequent conversation said, "that if the horse were unsound, (which he denied) he would take it again, and return the money;" this does not amount to an abandonment of the original contract, which still remains

(c) Doug. 23.

(d) Doug. 24. Cowp. 818.

open ; and though the horse be unsound, the vendee must sue upon the warranty, and cannot maintain *indebitatus assumpsit* for money had and received to recover back the price, after a tender of the horse. This was settled in the case of *Payne v. Whale*, (e) in which the Court determined that the plaintiff could not recover in this general form of action, but ought to have declared specially ; and Lord *Ellenborough* Ch. J., in delivering the opinion of the Court, said, " This was a cause tried before me at *Guildhall*, to recover back the price of a horse sold as a sound horse, but which proved to be unsound. It was to be collected from the evidence, that there had been a warranty of soundness at the time of the original contract of sale : but in a subsequent conversation, when the plaintiff objected that the horse was unsound, the defendant said, " that if the horse were unsound, he would take it again and return the money." And it was contended that the action for money had and received would not lie, upon the authority of *Power v. Wells*, (f) and *Weston v. Downes*, (g) because this was no other than a mode of trying the warranty, which could only be by a special action on the case. It had occurred to me at the trial, that the defendant, by means of his promise to return the money and take back the horse if it were unsound, had placed himself in the situation of a stake-holder ; and therefore, that on proof that the horse was unsound, he was to be considered as holding the money for the use of the plaintiff. But upon further consideration, I am clearly satisfied that the promise did not discharge the original warranty, and that the party complaining of the breach of that warranty must still sue upon it. The second conversation is not to be considered as an abandonment of the original warranty, the performance of which the defendant still insisted upon ; but rather as a declaration that if the warranty were shown to be broken, he would do that which is usually done in such cases, take back the horse and repay the money. Then where any question on the warranty remains to be discussed, it ought to be so in a shape to give the other party notice of it, namely, in an action upon the warranty."

So, in the case of *Cooke v. Munstone*, (h) which was an action of *assumpsit*. And the first count of the declaration was for not delivering 35 chaldrons of soil or breeze according to a special contract between the defendant and the plaintiff ; to which the count for money had and received was added. At the trial, before Sir *James Mansfield* Ch. J., the plaintiff in support of the special contract proved by a witness, that the defendant having agreed to supply the plaintiff with 35 chaldrons of soil at 7s. per chaldron, he thereupon paid to the defendant 2l. 5s. as earnest ; that the plaintiff afterwards sent his barge and demanded the soil, offering at the same time to pay the remainder of the purchase money as soon as the soil

(e) 7 East Rep. 274.
(f) Ante. 320.

(g) Ante. 320.
(h) 1 New Rep. C. B. 351.

should be put on board, but that the defendant refused to deliver it on account of a dispute with the plaintiff respecting the wharf from whence it should be loaded. It appearing, however, that soil and breeze were very different things, it was objected for the defendant, that as the plaintiff had declared upon a contract for the delivery of soil or breeze, and had only proved a contract for the delivery of soil, he must be nonsuited; whereupon the plaintiff insisted that he was entitled for a verdict for 2*l.* 5*s.*, on the count for money had and received. His Lordship thought that as the plaintiff had proceeded upon a contract which never appeared to have been rescinded by any act or agreement between the parties, but only broken by a refusal of one party to perform it, he was not at liberty to recover the deposit upon the count for money had and received, and accordingly nonsuited the plaintiff: and of this opinion was the Court of Common Pleas upon a rule for setting aside the nonsuit.

So, in the case of *Fortune v. Lingham*, (i) it was held, that if upon a contract for the sale of a quantity of *stock fish* to be delivered according to sample, and the price is paid for them; and the seller afterwards delivers them much inferior to the sample, and in a very bad and putrid state, but they are accepted by the buyer; the latter cannot maintain an action for money had and received to recover back the fine so paid, but must declare specially upon the warranty. And in this case Lord *Ellenborough* Ch. J. said, "If, instead of stock fish, the defendant had delivered to the plaintiff a quantity of saw-dust, the price might be recovered back in the manner proposed. But *stock fish* were delivered, though seemingly in very bad condition; and you cannot be permitted to try whether they were of a good or bad quality, whether they were fit or unfit for use, in an action for money had and received. For this purpose a special count was indispensable."

3. OF MONEY PAID IN CONSIDERATION OF SOME ACT TO BE DONE OR OTHER BENEFIT TO BE RECEIVED BUT WHICH HAS FAILED.]—Where a person has paid money upon a contract or agreement, which has not been performed, he may, in general, affirm the agreement, by bringing a special action of *assumpsit* thereon for general damages; or he may disaffirm it, and recover back the money so paid by action of *indebitatus assumpsit* for money had and received. This was settled in the case of *Dutch v. Warren*, (k) which was an action of *indebitatus assumpsit* for money had and received. The case was as follows;—Upon the 18th August, 1720, on payment of 262*l.* 10*s.* by the plaintiff to the defendant, the defendant agreed to transfer him five shares in the *Welch* copper mines at the opening of the books; and for security of his so doing gave him this note:—"18th of August, 1720. I do hereby ac-

(i) 2 Campb. 416.

in 2 Bur. 1010. and reported in Stra. 406.

(k) Cited at large by Lord *Manfield*, but not so correctly.

knowledge to have received of *Phillip Dutch*, 262*l.* 10*s.* as a consideration for the purchase of five shares; which I do hereby promise to transfer to the said *Phillip Dutch* as soon as the books are open; being five shares in the *Welch* copper mines. Witness my hand, *Robert Warren*." The books were opened on the 22d of the said month of *August*, when *Dutch* requested *Warren* to transfer to him the said five shares, which he refused to do, and told the plaintiff he might take his remedy. Whereupon the plaintiff brought this action for the consideration money paid by him. And a case being made for the opinion of the Court of Common Pleas, the action was resolved to be well brought: and the Court said, "that the extending these actions depends on the notion of fraud. If one man takes another's money to do a thing, and refuses to do it, it is a fraud; and it is at the election of the party injured, either to affirm the agreement, by bringing an action for the non-performance of it; or to disaffirm the agreement *ab initio*, by reason of the fraud, and bring an action for money had and received to his use."

So, in the case of *Giles and others v. Edwards*, (m) which was an action for money had and received, tried before Mr. Justice *Lawrence* at the spring assizes for *Shrewsbury*, 1797. The case was as follows: On the 6th of *June*, 1791, the defendant agreed to sell to the plaintiffs all his cordwood growing at *Tredgodoer* in *Shropshire* at 11*s.* 6*s.* per cord, ready cut; the wood was to be coaled and cleared from off the premises by *Michadmas*, 1792, and the money was to be paid on the 1st of *March*, 1792. It also appeared, that the custom was for the seller to cut off the boughs and trunks, and then cord it, and for the buyer to record it; after which it became the property of the buyer: the defendant cut sixty cords, ten of which he corded, and the plaintiffs re-corded half a cord, and measured the rest. On the 8th of *March*, 1792, the plaintiffs paid the defendant 20 guineas, but the defendant neglecting to cord the rest of the wood, the plaintiffs brought this action to recover back the 20 guineas, as having been paid on a contract that had failed. It was objected on the trial that this action could not be maintained, the contract being still open, and that the plaintiffs should have brought a special action on the case for non-performance of the contract. But the learned judge was of opinion that, as it was owing to the fault and negligence of the defendant that the contract, which was entire, was not carried into execution, the plaintiffs were at liberty to consider the contract at an end, and recover back the money that they had paid, the consideration having failed. That what had been done by the plaintiffs could not be considered as an execution of the contract in part, for that all that they had done was merely to measure the wood, and record a very small part of it. The plaintiffs accordingly obtained a

(m) 7 Term Rep. 181.

verdict. And upon a rule to set aside this verdict, and to enter a nonsuit, the court were clearly of opinion, that the directions given at the trial were right : and Lord *Kenyon* Ch. J. said, " This was an entire contract, and as by the defendant's default, the plaintiffs could not perform what they had undertaken to do, they had a right to put an end to the whole contract, and to recover back the money that they had paid under it ; they were not bound to take part of the wood only."

There are, however, a class of cases in which it has been determined, that though the contract has not been performed, and the party paying the money has derived no benefit from the contract, and the consideration has failed, the money cannot be recovered back. Thus, where A. having obtained a patent for an invention, of which he supposed himself the inventor, agreed to let B. use it upon payment of a certain annual sum secured by bond ; this sum was paid for several years, when B. discovering that A. was not the inventor, but that it was in public use before A. obtained his patent, brought an action for money had and received to recover back the amount of the annuity paid. But it was determined that B. could not recover back the amount of the annuity so paid ; both parties having acted under a mistake, and B. having had the use of the invention. (n)

So, in the case of *Cartwright v. Rowley*, (o) which was an action of *assumpsit* for money had and received. The plaintiff was a patentee of a steam-engine, and had employed the defendant, who was an engine maker, to make some engines for him under the patent : in the progress of the work, the plaintiff had advanced several sums of money to the defendant, which he sought now to recover back on the ground that the defendant had been so inattentive to the order, and so long in completing the engines, that the opportunity of disposing of them was lost, so that they became useless to the plaintiff. The ground relied upon, to establish the plaintiff's right to recover in this action, was, that the money was paid without any consideration, the work, for which it had been given, having been rendered by the defendant's own default, of no value to the plaintiff. But Lord *Kenyon* Ch. J. said, " This action cannot be maintained, nor the money recovered back again by it ; it has been paid by the plaintiff *voluntarily*, and where the money has been so paid, it must be taken to be properly and legally paid ; nor can money be recovered back again by this form of action, unless there are some circumstances to shew that the plaintiff paid it through mistake, or in consequence of coercion."

And in the case of *Stokes v. Twichen*, (p) which was an action of *indebitatus assumpsit*, brought to recover back 60*l.* advanced by the plaintiff to the defendant, as a premium or apprentice-fee with her son upon

(n) *Taylor v. Hare*, 1 New Rep. 260.

(o) 2 Esp. Rep. 723.

(p) 8 Taunt 492.

an indenture of apprenticeship, which did not contain any statement respecting the premium, and was not stamped ; and the indenture being void for want of such statement, and also as not having been stamped within time : it was determined by the Court of Common Pleas, that the plaintiff could not recover back the apprentice-fee from the defendant, though paid without consideration, the indenture being void. And *Gibbs* Ch. J. said “ This was an action in which the plaintiff sought to recover the sum of 60*l.*, paid as a premium with her son to the defendant, under an indenture of apprenticeship, on the ground that the premium was not inserted in the indenture, and, that therefore the indenture was void, and the money paid without consideration. Supposing the plaintiff to be an innocent party, she would certainly be entitled to recover the money so paid, as being paid without consideration ; but any plaintiff who seeks to recover on such grounds, must come into court with clean hands. It has been contended for the plaintiff in this case, that no imputation rests on her ; for that it was the master’s duty to insert the premium, on whom alone the legislature imposes the penalty for the default. This latter proposition is true, and if the case rested here, I should be of opinion that the plaintiff was entitled to recover ; but there are other circumstances in this case ; circumstances which deeply implicate the plaintiff in a collusion for the purpose of fraud. With the notice before her eyes, she executed the indenture without the insertion of the premium, and by her act endeavoured to give validity to an instrument which had not that in it which the legislature has prescribed for giving effect to the provisions of the revenue. The legislature marks out the master alone for punishment ; but all are involved in the offence who lend assistance to the master in giving effect, as this plaintiff has done, to unlawful purposes. In this case both the defendant and the plaintiff were parties to the offence. The former, by concealing from the public and the revenue officer, the amount of the premium, and so defrauding the revenue ; the latter by enabling the defendant to conceal that amount from the revenue, whereby she was likely to find the defendant content with a less premium than he might otherwise have been disposed to take. Under these circumstances the plaintiff cannot be considered as an innocent party ; and we are of opinion that she is not entitled to recover.”

So, in the case of *Dewberry v. Chapman*, (q) which was an action of *indebitatus assumpsit* for money had and received, where the defendant had taken the plaintiff’s son apprentice, and received 30*l.*, and had engaged to teach him the trade of a goldsmith, and make him free of *London* : the defendant, however, was a foreigner, and though he had been bound to a freeman, yet by the custom of *London* no apprentice

(q) Comb. 341. Holt’s Rep. 35. S. C.

can have his freedom without an actual service with a freeman. It was ruled by *Holt Ch. J.*, "That an *indebitatus assumpsit* would not lie, the defendant having cheated the plaintiff of his money, and that the plaintiff had no remedy, unless by special action on the case for not making him a freeman."

If, upon an agreement to carry a passenger on board a ship, from *London* to the *West Indies*, the passage money is to be paid in *London* before the commencement of the voyage; and the passenger puts his baggage on board in the *Thames*, meaning himself to embark at *Portsmouth*; and the ship is lost in going round to that place; the passage money cannot be recovered back. But if the agreement was to carry the passenger from *Portsmouth* to the *West Indies*, it might have been recovered back; and the learned *Ch. J. Gibbs* in such case said, "If the voyage was commenced, and the ship was prevented completing it by perils of navigation, the captain may be entitled to retain the passage money previously paid to him. The contract for this purpose may either be express, or may be evidenced by established usage. Here it is proved, that in *West India* voyages, the passage money is paid before the voyage commences, and it does not appear to be returned, although the voyage is defeated. On the other hand, if the ship was lost before the commencement of the voyage, for which these parties had contracted, the money paid by anticipation must be returned." (q)

So, in the case of *De Silvale v. Kendall*, (r) which was an action for money had and received. And at the trial, it appeared, that in a charter party made between the master of the ship and the freighter, upon a voyage from *Liverpool* to *Maranham*, and thence back to *Liverpool*, the freighter covenanted that he would pay for the freight from *Liverpool* to *Maranham* 120*l.*, and from *Maranham* to *Liverpool* at the rate of 2½*d.* per lb. for cotton, which should be delivered at *Liverpool*; such freight to be paid as follows, viz., 120*l.* for freight of the outward cargo to *Maranham*, and as much cash as might be found necessary for the vessel's disbursements in *Maranham*, to be advanced by the freighter, his agents or assigns, to the master, when required, free from interest and commission, at the current exchange of the place; and the residue of such freight to be paid on delivery of the cargo in *Liverpool*. The ship arrived at *Maranham*, where the 120*l.* outward freight, and also 192*l.* for the necessary disbursements of the ship, were paid or advanced by the freighter to the master; and the ship received her homeward cargo and sailed for *Liverpool*, but was lost by capture. The Court determined, that the freighter was not entitled to recover back the 192*l.* And *Bayley Just.* said, "Wherever there is an express stipulation that the party who is to be entitled to freight, shall be paid any portion of

(q) *Gillan v. Simpin*, 4 Campb. 241.

(r) 4 Maule & Sel. 37.

it in advance, there ought also to be an express stipulation that the parting paying it shall be entitled to recover it back, if freight be not earned, if such be the intention of the parties to the instrument. For without some provision of that sort how are we to raise a new implied contract to that effect? It seems clear, that the parties to this instrument have stipulated for a partial payment in advance by way of freight, and not as a loan; for after settling the amount and rate of freight to be paid for the voyage out and home, they stipulate that *such freight* shall be paid as follows, that is, the outward freight to *Maranhã*, and as much cash as should be necessary for the ship's disbursements in *Maranhã*, to be advanced by the freighter when required, free from interest and commission, at the current exchange of the place, and the *residue of such freight* on the delivery of the homeward cargo. Therefore, taking the whole of the clause together, it seems to me, that this payment is to be considered as a payment of so much of the freight in advance. And if that be so, upon what ground is it to be recovered back? It is suggested as a ground, that the freight has failed by the nonperformance of the voyage; and thus the plaintiff has derived no benefit from it; but what benefit has the defendant derived? He also has lost as well as the plaintiff, and the question is, whether he is to bear a farther loss? Now in order to maintain money had and received, it is in general incumbent upon the plaintiff to shew, that the defendant has money of the plaintiff, which in equity and good conscience he ought not to detain from him. But here the question raised is not whether the defendant has money which he ought not to detain, but whether out of his own money he shall be bound to make good that which the plaintiff has lost. It seems to me that the defendant shall not be so bound."

But in the case of *Robinson v. Anderton*, (s) which was also an action of *assumpsit* for money had and received. The plaintiff had succeeded the defendant in a public-house, and paid him for some fixtures which belonged to the house, as being scheduled in the original lease, and for which the plaintiff was afterwards obliged to pay the lessor. The defendant had been under tenant of the house, and had paid the person of whom he rented it for these very fixtures. On behalf of the defendant, it was contended that this action could not be maintained. The present defendant had himself paid for these fixtures, and of course thought he was entitled to sell them, and as he did not commit any fraud on the plaintiff, he could not, in this action, be compelled to refund the money. Lord *Kenyon* Ch. J., before whom the cause was tried, said, "This action imputes nothing criminal to the defendant; his title is disaffirmed, for it appears he has received money which he had no right to, and which he must therefore return. He may recover back the money from

(s) Peake Cas. N. P. 94.

the person to whom he paid it, and, perhaps, tack the costs of this judgment to it."

LASTLY.—OF MONEY RECEIVED ON THE SALE OF ANNUITIES, WHERE A GOOD TITLE CANNOT BE MADE, OR WHERE THE DEEDS HAVE BEEN SET ASIDE OR PUT AN END TO BY AGREEMENT OR OTHERWISE.] — Where the vendor of an annuity engages that a good title shall be made to the vendee on a particular day, he must be prepared to produce his title deeds at the particular day, or the vendee is entitled to rescind the contract, and recover back his deposit money in an action of *indebitatus assumpsit* for money had and received. Thus, in the case of *Berry v. Young*, (t) which was an action for money had and received, and brought to recover back the deposit money paid by the plaintiff, who was the purchaser of an annuity sold by the defendant (an auctioneer) at a public auction. One of the conditions of sale was, that a good title should be made out by the 10th of July. In the beginning of July the plaintiff called on the seller of the annuity, to show him the title deeds; but he not having them in possession, gave him an abstract of the title, which did not contain any of the deeds. At the trial, before Lord Kenyon Ch. J. it was submitted to his lordship, that application ought to have been made to the vendor at an earlier period, in order to enable him to get the deeds by the 10th of July. But his lordship said, "A seller of an estate ought to be prepared to produce his title deeds at the particular day: a court of equity, indeed, will, under particular circumstances, enlarge the time, but then those circumstances entitling him to such indulgence must clearly appear; which is not the case in this instance. It is, however objected, that the plaintiff had no right to the possession of those deeds; but though he had no right to keep them, he had a right to inspect them. A court of equity would have obliged the vendor to give attested copies of the deeds at his own expense, with an undertaking to produce them thereafter at the vendee's expense, for the support of his title. As the seller, therefore, has here failed in completing his engagement, the plaintiff is entitled to a return of his deposit money."

So, where the consideration of an annuity consists partly of money actually paid, and partly of a precedent debt for goods *bonâ fide* sold to the grantor; and the annuity is set aside by the court, at the instance of the grantor, for some mistake in not complying with the formal requisites of the annuity act, (17 Geo. 3. c. 26.,) and not on account of any fraud in the transaction, the grantee may recover back the consideration in an action of *indebitatus assumpsit* for money had and received, and goods sold and delivered. Thus, in the case of *Shove v. Webb*, (u) which was an action of *indebitatus assumpsit* for goods sold and delivered, and

(t) Sittings after Mich. Term, 1783. (u) 1 Term Rep. 732.
8 Esp. Rep. 640. n. a.

money had and received. On the trial, a verdict was taken for the plaintiff, damages 160*l.* 17*s.* 3*d.*, subject to the opinion of the Court as to the sum of 118*l.* 17*s.* 3*d.* part thereof on the following facts: The defendant on the 26th of *July* 1783, executed a bond and warrant of attorney to confess judgment thereon in the Court of Common Pleas, for securing an annuity of 25*l.* during the life of the defendant. The defendant also executed an assignment of his half pay as an ensign in the army as a collateral security. The deeds for securing the annuity were afterwards set aside in the Common Pleas, because part of the consideration, for which the annuity was granted, was 46*l.* 19*s.* 9*d.* due from the defendant to the plaintiff for goods previously sold by the plaintiff to him, which was not specified in the memorial as registered. The residue of the consideration, for which the annuity was granted, was 71*l.* 17*s.* 6*d.* paid by the plaintiff to the defendant in cash at the time of granting the annuity. The defendant was indebted to the plaintiff in 42*l.* for goods sold. And the question for the opinion of the Court was, whether the plaintiff was entitled to recover any and what sum beyond the 42*l.* And after argument, the Court determined, that the plaintiff was entitled to recover for his whole demand. And *Ashurst* Just., in delivering the opinion of the Court, said, "The contract was strictly legal, and not within the mischiefs intended to be remedied by the annuity act. And the security was not set aside on account of any fraud or defect in the contract itself, but upon a formal defect in making the memorial, or at least it was an innocent mistake of the law. And taking that to be the case, when the security was vacated, the original contract revived. If indeed the sale had been made a few days before, colourably, and with a view of afterwards stating the antecedent debt as a part of the consideration of an annuity intended to be granted, that would have totally altered the case; but as it is to be taken that they were *bonâ fide* sold, we think the plaintiff is entitled to recover for them. In regard to the money paid as part of the consideration; as the security is not set aside for any fraud in the transaction, but merely for a mistake or omission in form, it becomes unconscientious in the party to retain it; and is therefore recoverable on the count for money had and received to the plaintiff's use."

So, where the grantor of an annuity applied to have it set aside on motion, and to vacate a judgment, which had been irregularly entered up on a warrant of attorney, which was given for entering up judgment on a bond in another court to secure the annuity, and which warrant of attorney was improperly described in the memorial; and the Court accordingly set aside the judgment: it was determined, that the grantee might recover back the consideration money in *assumpsit*, and was not put to his action on a bond which was also given for securing the annuity, and which bond was not ordered to be cancelled, though voidable

in pleading by virtue of the annuity act. Thus, in the case of *Scurfield v. Gowland*, (v) which was an action of *assumpsit* for money had and received. At the trial, it appeared that the defendant had granted to the plaintiff a certain annuity secured by a deed, a bond, and warrant of attorney to enter up judgment in the Common Pleas; but in the memorial of the annuity the latter instrument was stated to be a warranty of attorney to enter up judgment in the Court of King's Bench, and judgment having afterwards been entered up by mistake in the Court of King's Bench, the defendant had applied to set aside the annuity upon this error in the memorial, and to have the securities delivered up to be cancelled. And the Court of King's Bench did accordingly set aside the judgment, and direct that the warrant of attorney should be delivered up to be cancelled, but made no order as to the deed or bond, which remained uncanceled: nor was there proof of any offer having been made by the plaintiff to the defendant to deliver up or cancel them. This action was brought to recover back the consideration money, upon the ground of the consideration for the annuity having failed. But it was objected at the trial that the action of *assumpsit* would not lie, the plaintiff still having his remedy upon the bond and deed: and on this ground the plaintiff was nonsuited. But afterwards a motion was made to set aside the nonsuit; and the counsel for the plaintiff contended, that the decision of the court, upon the application of the defendant, was not merely that the judgment should be vacated, but that the annuity itself should be set aside; that the defendant then had made his election to vacate the annuity; and having at least withdrawn from the plaintiff one of his securities for it, the consideration, which was paid for all the securities, had failed, and therefore he was entitled to recover it back. The court was of this opinion, and accordingly set aside the nonsuit, and granted a new trial. And Lord *Ellenborough* Ch. J. said, "The argument last urged is very forcible. The plaintiff contracted for one entire assurance, consisting of several securities; and he has a right to have that assurance entire, or to have back his money. The defendant has taken away one of his securities, and therefore the consideration for the money has failed. On this ground I think the present action may be sustained; and to be sure the substantial justice of the case is all on the plaintiff's side; though that ought never to be attained by violating the forms of law; but on the latter ground I think it may be attained without any such violation."

But where an annuity has become void for a defect in the memorial, the grantee cannot maintain an action for money had and received to recover back the consideration money, unless the annuity has been set aside by the act of the court, or the grantor has refused to re-execute

(v) 6 East Rep. 241.

valid securities, or to pay the annuity. Thus, in the case of *Weddell v. Lynam and Jones*, (w) which was an action of *assumpsit* for money had and received, brought to recover the sum of 570*l.* which had been paid by the plaintiff to the defendants, as the consideration of an annuity granted by them for the life of *Jones*. The memorial of this annuity not having been duly registered, in pursuance of the stat. 17 Geo. 3., the annuity was void under that statute, and the action was brought to recover back the consideration money paid for it. The plaintiff proved the payment of the consideration money. The counsel for the defendant made two points: 1st. That supposing the plaintiff to be entitled to recover, the defendant was entitled, under the issue in the cause, to an allowance of all payments made on account of the annuity, and of all expences incurred on it; and Lord *Kenyon* Ch. J. ruled that he was so. But, 2dly., he contended that this annuity having become void by the act of the plaintiff himself, and there being no evidence of any demand of the arrears of the annuity from the defendants, and a refusal by them to pay them, or any application to them to re-execute the securities, which they might have done, the plaintiff could not raise a cause of action by his own act, or by reason of his own negligence or default. The counsel for the plaintiff answered, that the securities having become void by act of law, the statute having declared all annuities absolutely void, the memorials of which did not comply with the statute, the plaintiff was at liberty immediately to have recourse to his action, to recover back the consideration. But Lord *Kenyon* Ch. J. said, "that it should not be in the power of the grantee of an annuity, by his own act or negligence, to rescind the contract, and avoid the security given, at his option; that as there was no evidence of any application to the defendants, either for payment of the annuity, or to re-execute the securities, and as the annuity had never been set aside by an act of the Court, he was of opinion that the action could not be maintained." The plaintiff was accordingly nonsuited.

So, in the case *Richards v. Borrett*, (x) which was also an action of *assumpsit* for money had and received, it appeared in evidence, that the defendant being in the *Fleet Prison*, and distressed for money, had applied (by means of one *Bryant*, an attorney,) to the plaintiff for a loan. The plaintiff lent him some money, and took from him a bond and warrant of attorney, to secure an annuity. Shortly after, the defendant applied through the same channel to the plaintiff to borrow more money; the plaintiff required a further security than a bond and warrant of attorney; and the defendant deposited with him the lease of a farm in *Kent*, which he represented as unincumbered; and it was endeavoured to be proved that he meant to charge this real property with payment

(w) 1 Esp. Rep. 309.

(x) 3 Esp. Rep. 102.

of an annuity for the latter sum advanced ; but the defendant's counsel asserted that it was only deposited with a view to secure the payment of the rent by the tenant in discharge of the annuity. The proof not coming up exactly to that point, Lord *Kenyon* Ch. J. said, " It had been held in equity that depositing all, or even part of the deeds respecting real property, implied an intention of charging the real estates, and gave the party a lien upon them ; and that as this was an equitable action, he would hold the same doctrine. No memorial of the first annuity had been registered, nor had any deed to charge the real property with the second annuity been registered ; and the annuity having been in arrear, the present action was brought to recover the consideration money." No application had been made to the court to set aside the first annuity ; and for the defendant it was contended, that the securities were only voidable ; and that being still in existence, the present action could not be maintained. Lord *Kenyon* Ch. J., thought that the objection was well founded with respect to one annuity ; and said, " The party should be called upon to complete the securities ; and those for part having been completed, as far as the party had been called upon, they must be considered as valid, until set aside by the court : but, with respect to the other, the defendant not having done, or being unable to do that which he had undertaken, namely, to charge the real estate, the plaintiff was entitled to recover the consideration money of that annuity."

Where an annuity has been paid for some time, and then rescinded by agreement of the parties, on account of the deeds not having been properly enrolled, the purchaser is entitled to recover back the whole of his purchase money. Thus, in the case of *Beauchamp v. Borrett*, (y) the plaintiff having purchased an annuity of the defendant, which was void on account of the deeds not being enrolled, it was agreed, after two yearly payments had been made, that the annuity should be rescinded ; and that the defendant should pay to the plaintiff the money paid for the purchase of the annuity, with interest from the last yearly payment. The sum paid for the purchase was 600*l.* The annuity was 100*l.* *per annum* ; and the only question in the cause was, whether, under this agreement, (which was contained in a letter from the defendant) the plaintiff was entitled to recover the whole 600*l.* with interest from the time of the last payment, or whether the 200*l.* which had been paid should be deducted. Lord *Kenyon* Ch. J. was of opinion, that both under the agreement, and according to the justice of the case, the plaintiff was entitled to recover the whole 600*l.* and interest, from the time of the last yearly payment ; and the jury gave damages accordingly.

But where an annuity has been set aside on account of a defective

(y) *Peake's Case*, N. P. 109.

registry, and the grantee brings an action for money had and received, to recover back the consideration money paid for the annuity, the grantor may set off the payments made in respect of such annuity, though for more than six years, unless the plaintiff reply the statute of limitations. This was settled in the case of *Hicks v. Hicks*, (z) which was also an action of *assumpsit* for money had and received, to recover back 711*l.*, the consideration money paid, many years back, for an annuity granted by the defendant to the plaintiff; but which annuity, after having been paid several years, (more than six) had been recently set aside by the court, on the application of the defendant, for a defect in the memorial of registry. The defendant pleaded a set-off of more money paid to the plaintiff's use than was due to him: and this appeared at the trial to be true, provided the defendant was at liberty to set off all the payments which had been made to the plaintiff in respect of the annuity for more than six years past; which Lord *Ellenborough* Ch. J. held that he might, the plaintiff not having replied the statute of limitations; upon which a verdict passed for the defendant. And the Court afterwards, upon a motion to set aside the verdict, confirmed his lordship's opinion.

So, in the case of *Waters v. Sir William Mansell, Bart.*, (a) it was determined, that to entitle the grantee of an annuity to recover back the price, as money had and received, it is sufficient if the grantor has communicated to the grantee, that there are defects in the memorial, and has treated for a compromise on the ground of the annuity being void, although the grantee neither demands payment of the arrears, nor tenders new securities, nor delivers up the old ones before he sues; and although the grantor has taken no active measures to set aside the securities.

In the case of *Straton v. Rastall*, (b) it was determined, that a person who merely lent his name as a surety for the due payment of an annuity, and who received no part of the consideration money, is not liable to be sued for any part of it, after the annuity deeds have been set aside, though he may have formally acknowledged the receipt of the money on the back of the deeds.

10. OF FEES RECEIVED BY COUNSEL, &c.

No action will lie to recover back a fee given to a barrister to argue a cause which he did not attend. This was determined in the case of *Turner v. Phillips*, (c) was an action of *indebitatus assumpsit* for money had and received. The plaintiff being a party in a former cause, had

(z) 3 East Rep. 16. 4 Esp. Rep. 196.
S. C. reported by the name of *Hills v. Hills*.

(a) 3 Taunt. 56.
(b) 3 Term Rep. 366.
(c) Peake's Cas. N. P. 122.

given the defendant a brief to attend as one of his counsel on the trial of that cause; and the defendant not having attended the trial, the present action was brought to recover back the fee given to him on that occasion.

Lord Kenyon Ch. J. advised an agreement between the parties, saying, that whether Mr. *Phillips* would choose to return the fee or not, was for his own consideration, but if the cause was to proceed he should feel himself obliged to interpose, and the parties might apply to the court if they were dissatisfied with his opinion. His lordship alluded to the case of *Chorley v. Bolcot*, (d) lately decided, and mentioned the general opinion of the profession, that the fees of barristers and physicians were as a present by the client, and not a payment or hire for their labour. The cause was accordingly settled out of Court.

11. OF PREMIUMS RECEIVED ON MARINE INSURANCES.

In cases of insurance, the risk or peril insured against is the consideration for which the premium is paid. But where no risk has been run, the consideration for the premium fails, and an action of *indebitatus assumpsit* will in general lie to recover it back from the underwriter. And the reason given is, that a policy of insurance is a contract of indemnity; the underwriter receives the premium for running the risk of indemnifying the insured; and therefore if he run no risk, to whatever cause, except fraud, this may be imputable, the consideration for which the premium was paid to him fails, and he ought to return it. (e) So, if the contract be void on account of a non-compliance with any warranty, express or implied, as if the ships do not sail on the day prescribed, or do not depart with convoy, or be not sea-worthy, and there be no fraud imputable to the insured, he shall be entitled to a return of premium, because the contract never attached, and the risk therefore never commenced. (f)

So, if the insurance be upon a voyage which is divisible into several distinct risks, which are, in effect, several distinct voyages, the premium may be apportioned according to these several risks; and in case one or more of those risks should not have been commenced, the proportion of premium applicable to those parts shall be returned. (g) But if the risk be entire, and be once commenced, it is a general rule, that there shall be no return of premium. And the shortness of the time when the thing insured was put in risk, affords no ground for a return of any part of the premium; for it becomes the absolute property of the insurer the moment the risk commences, though it should cease the moment after. (h)

So, if where the insurance is for a term specified in the policy, and for

(d) 4 Term Rep. 517.

(e) Cowp. 658. Per Lord Mansfield.

(f) 2 Marsh. on Insurance, 654, 2 Ed.

(g) 5 Bosc. 1257.

(h) 2 Marsh. 661.

one entire premium, if the risk be begun, and an event happen immediately after, which determines the contract, there shall be no return of premium. (i)

It is observed, (k) that clauses are frequently inserted in policies of insurance that, upon the happening of a certain event, or the performance of some stipulation, the underwriter shall return a part of the premium; and in such case, if the event happens, or the thing stipulated be performed, the insured shall be entitled to the return of premium agreed upon.

And as a general rule it is said, (*) that if through a mistake, misinformation, or any other innocent cause, an insurance in a single policy be made without any interest whatsoever in the thing insured, or to a much larger amount than its real value; in the one case the insurer shall return the whole premium; in the other he shall return in the proportion which the true value bears to the sum insured. Thus, if a man, supposing he has goods on board a certain ship to the value of 1000*l.*, insure to that amount, but afterwards find either that he has no goods at all on board, or that he has goods only to the amount of half the insurance: in the one case he would be entitled to a return of the whole premium; in the other, to a return of the moiety. And all the underwriters upon a policy in which the effects are insured beyond their value, must bear any loss that may happen, and repay a part of the premium, in proportion to their respective subscriptions without regard to the priority of their dates. But upon a wager policy, which by the stat. 19 Geo. 2. c. 37. is illegal and void, the insured cannot recover back the premium after the risk has been run: for he shall not after thus taking the chance of a loss, and of obtaining from the *generosity* at least of the underwriters, the sum insured, be permitted to recover back the premium. (l) So, where the insurance is upon an illegal trading, the insured cannot recover back his premium. (m)

**12. OF MONEY PAID AND RECEIVED UNDER A MISTAKE;
OR IN IGNORANCE BOTH OF THE LAW AND OF THE FACT:
AND OF VOLUNTARY PAYMENTS MADE BY A PARTY EITHER
WITH FULL KNOWLEDGE OF ALL THE CIRCUMSTANCES;
OR, HAVING THE MEANS OF SUCH KNOWLEDGE AT THE
TIME, OMIT MAKING DUE INQUIRY, &c. INTO THE CIR-
CUMSTANCES, UNDER WHICH THE CLAIM IS MADE.**

If a person pays money to another under a mere mistake of fact, or in ignorance of the law, and without full knowledge, or having the

(i) Cowp. 666.

(k) 2 Marsh. 639.

(*) *Ibid.* 669.

(l) *Lowry v. Bourdieu*, Doug. 451.

(m) 2 Marsh. on Insurance, 645, 646.
And see more at large on the subject of

a Return of Premium, chap. 15. in the same book, and Park on Insurance, chap. 19. where all the cases are collected and brought together, showing in what instances the Premium may or may not be recovered back.

means of such knowledge, of the circumstances attending the claim, an action of *indebitatus assumpsit* will in general lie to recover it back. (a) So, if two reckon together, and one over-pays the other, *indebitatus assumpsit* lies for the money so paid. (o) So, where goods are shipped from abroad, consigned to a merchant in this country, the freight is payable according to their *net* weight as ascertained at the king's landing scales, and not according to the weights expressed in the bill of lading, unless there be a special contract so to pay for them; and therefore if the consignee, in order to get the goods delivered to him, pay more than the *net* weight amounts to, he may recover back the surplus in an action for money had and received. (p)

But if a person with knowledge of the facts, though under a mistake as to the law, pays over money to another, who claims it as a right, he cannot, upon discovering what his legal right was, recover it back, supposing there is nothing against conscience in the other party's retaining it. This point was very fully discussed and determined in the recent case of *Sir Charles Brisbane, Knt. v. Dacres*, (q) where the captain of a king's ship having brought to *England* public treasure upon the public service, and treasure of individuals in his ship for his own emolument; and received freight for both, and having paid over one third of it, according to a usage heretofore established in the navy, to the admiral under whose command he sailed. But afterwards discovering that the law does not compel captains to pay to admirals one-third of the freight; the captain brought an action for money had and received, to recover it back from the admiral's executrix: the majority of the Court of Common Pleas (Mr. Justice *Chambre* dissenting) determined, that he could not recover back the private freight, because the whole of that transaction was illegal; nor the public freight, because he had paid it with full knowledge of the facts, although in ignorance of the law; and because it was not against conscience for the executrix to retain it. The Chief Justice *Gibbs*, in delivering his opinion, took a very elaborate review of the cases on this subject, and said, "where a man demands money of another as a matter of right, and that other, with a full knowledge of the facts upon which the demand is founded, has paid a sum, he never can recover back the sum he has so voluntarily paid. It may be, that upon a further view he may form a different opinion of the law; and it may be, his subsequent opinion may be the correct one. If we were to hold otherwise, I think many inconveniences may arise; there are many doubtful questions of law; and when they arise, the defendant has an option, either to litigate the question, or to submit to the demand and pay the money. I think that

(a) 1 Salk. 22. 2 Bl. Rep. 826.
(o) 2 Ld. Raym. 1217.

(p) *Geraldes v. Donison*, Holt N.P. 346.
(q) 5 Taunt. 143.

by submitting to the demand, he that pays the money *gives* it to the person to whom he pays it, and makes it his, and closes the transaction between them. He who receives it, has a right to consider it as his without dispute: he spends it in confidence that it is his; and it would be most mischievous and unjust if he who has acquiesced in the right by such voluntary payment, should be at liberty, at any time within the statute of limitations, to rip up the matter and recover back the money. He who received it, is not in the same condition: he has spent it in the confidence it was his, and perhaps has no means of repayment. I am aware cases were cited at the bar in which were *dicta* that sums paid under a mistake of the law might be recovered back, though paid with a full knowledge of the facts; but there are none of these cases which may not be supported on a much sounder ground. I think the *dicta* that go beyond it, are not supported or called for by the facts of the cases. *Bilbie v. Lumley*, (r) I think is a decision to that effect. And for these reasons, I am of opinion the plaintiff is not entitled to recover." *Chambre Just.* said, "I concur in thinking the money is not recoverable on the payment of the private freight, whether the carriage of the treasure be considered as a legal or as an illegal transaction. If illegal, clearly the money cannot be recovered; if it be legal, the right to carry it must arise from the permission of government; and as the practice has been uniform for the admiral to receive his third part, we must take it that it is a part of the practice, and that the whole practice has had that assent of the government. As to the freight for the carriage of the public property, I think it stands on a different ground; and that the action is maintainable. The plaintiff had a right to it, and the defendant in conscience ought not to retain it. The rule is, that when he cannot in conscience retain it, he must refund it, if there is nothing illegal in the transaction: the case is different where there is an illegality. I think there are sufficient authorities to say this person has paid this money in his own wrong, and that it may be recovered back. In the case of *Bilbie v. Lumley*, there was a letter said to have been concealed which ought to have been disclosed; this letter was shewn to the underwriters, and they, after reading it, thought fit to pay the money. Now there the maxim *volenti non fit injuria* applies. In that case all argument was prevented by a question put by the Court to the counsel. I am not aware of any particular danger in extending the law in cases of this sort, for they are for the furtherance of justice; neither do I see the application of the maxim used by *Buller Just.* in the case of *Lowry v. Bourdieu*, and cited by the Court in *Bilbie v. Lumley*, *ignorantia juris non excusat*; it applies only to cases of delinquency where an excuse is to be made. I have searched far to see if I could find any instance of

(r) Post. 338.

similar application of this maxim, but I can find none in which this has been so applied. I cannot see how it applies here. In *Lowry v. Bourdieu*, the decision turned on the transaction being illegal, and it being illegal, the maxim applied in *pari delicto potior est conditio defendentis*. In the case of *Bize v. Dickason*,^(s) Lord Mansfield held, that if a person has paid that which in conscience he ought, but the payment of which could not be compelled; it shall not be recovered back in an action for money had and received; but that where a man has paid money under a mistake, which he was neither bound in law, nor called on in conscience to pay, he may recover it back. Now, the case against the plaintiff is not so strong as it has been stated. I do not find in the case that any demand was ever made of him, or any question mooted, upon which he thought it better to submit, than to litigate the point. No option ever presented itself to him; and the maxim *volenti non fit injuria* does not apply. It appears to me that the justice of the case with respect to the freight of the public treasure is entirely with the plaintiff."

Upon the subject of *voluntary payments*, the rule of law is, that where money is paid with full knowledge, or with full means of knowledge of the circumstances attending the demand, the party is not entitled to recover back such payment, though made without sufficient consideration. But if the money be paid without such full knowledge, or means of knowledge, or if the party be induced to pay it under false representations, he may recover back money paid under such circumstances.^(t) Thus, in the case of *Bilbie v. Lumley* and others,^(u) which was an action of *assumpsit* for money had and received, brought by an underwriter upon a policy of insurance, in order to recover back 100*l.* which he had paid upon the policy as for a loss by capture to the defendants, the assured. The ground on which the action was endeavoured to be sustained was, that the money was paid under a mistake, the defendants not having, at the time of the insurance effected, disclosed to the underwriter (the present plaintiff) a material letter which had before been received by them relating to the time of sailing of the ship insured. It was not denied that the letter was material to be disclosed; but the defence rested on before the Court, and at the trial, was, that before the loss on the policy was adjusted, and the money paid by the present plaintiff, all the papers had been laid before the underwriters; and amongst others the letter in question: and therefore it was contended at the trial, before *Rooke J.* at *York*, that the money having been paid with full knowledge, or with full means of knowledge of all the circumstances, could not now be recovered back again. On the other hand, it was insisted that it was sufficient to sustain the action, that the money

^(s) 1 Term Rep. 286.

^(u) 2 East Rep. 469.

^(t) Per *Dallas Ch. J.* 1 Brod. & Bing. 291.

had been paid under a mistake of the law; the plaintiff not being apprized at the time of the payment, that the concealment of the particular circumstance disclosed in the letter kept back was a defence to any action which might have been brought on the policy: and the learned judge being of that opinion, the plaintiff obtained a verdict. But, afterwards, upon a motion for a new trial, the Court of King's Bench determined that the plaintiff was not entitled to recover back the money; it having been paid *voluntarily* with a full knowledge of the facts of the case: therefore the verdict was set aside. And Lord *Ellenborough* Ch. J. asked the plaintiff's counsel whether he could state any case, where if a party paid money to another *voluntarily*, with a full knowledge of all the facts of the case, he could recover it back again on account of his ignorance of the law? No case being cited, his Lordship said, "The case of *Chatfield v. Paxton* (w) is the only one I ever heard of, where Lord *Kenyon* at *Nisi Prius* intimated something of that sort: But when it was afterwards brought before this court, on a motion for a new trial, there were some other circumstances of fact relied on; and it was so doubtful at last on what precise ground the case turned, that it was not reported. Every man must be taken to be cognizant of the law; otherwise there is no saying to what extent the excuse of ignorance might not be carried. It would be urged in almost every case."

So, where a man has paid a debt which would otherwise have been barred by the statute of limitations; or a debt contracted during his infancy, which in justice he ought to discharge, though the law would not have compelled the payment, yet the money being paid, it will not oblige the payee to refund it. But where money is paid under a mistake, which there was no ground to claim in conscience, the party may recover it back again by this kind of action. (x)

13. OF COMPULSORY PAYMENTS MADE EITHER UPON A PLEDGE OF GOODS, OR FOR A FINE UPON ADMITTANCE; OR UNDER LEGAL PROCESS; OR UPON A THREAT OF AN ACTION, OR DISTRESS, &c.; OR UNDER MERE COLOR OF PROCESS.

1. OF EXCESSIVE INTEREST PAID UPON A PLEDGE OF GOODS.] If an undue advantage be taken of a person's situation, and money be obtained from him by compulsion, such money may be recovered back in an action for money had and received. Thus, in the case of *Astley v. Reynolds*, (y) where the plaintiff having in the month of *August* pawned some goods with the defendant for 20*l.* without making any agreement for interest,

(w) 2 East Rep. 471. n. a.

(y) Stra. 915.

(x) 1 Term Rep. 286. 2 Bl. Rep. 825.
2 Bur. 1012.

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(y) Stra. 915.

(x) 1 Term Rep. 286. 2 Bl. Rep. 825.
2 Bur. 1012.

went in the *October* following to redeem them, when the defendant insisted on having 10*l.* as interest for the 20*l.* The plaintiff tendered him the 20*l.* and 4*l.* for interest, knowing the same to be more than the legal interest amounted to; the defendant still insisted on having 10*l.* as interest, whereupon the plaintiff finding that he could not otherwise get his goods back, paid the defendant the sum which he demanded, and brought an action for the surplus beyond the legal interest, as money had and received to his use; the Court held, that the action would well lie, for it was a payment by *compulsion*, and the plaintiff might have had such an immediate want of his goods that an action of trover would not have answered his purpose, and the rule *volenti non fit injuria* holds only where the party has a freedom of exercising his will.

2. OF AN EXCESSIVE FINE PAID UPON ADMITTANCE TO COPYHOLD PREMISES.] In the case of *Leake v. Lord Pigot*, (z) which was an action for money had and received by defendant for plaintiff's use. On the trial it appeared that the plaintiff had purchased of one *Sansom* a copyhold estate in *Patingham*, which was defendant's manor. The estate was let at a gross rent of 60*l. per annum*, landlord paying land-tax, chief rent, &c. The plaintiff applied at the next manor court to be admitted, and tendered 120*l.* for the fine (two years' rent) saying that no lord of a manor had a right to more than two years' value for a fine. *Stevens* (Lord *Pigot's* agent) refused to admit him unless he paid 10*l. per cent.* on the purchase money (1650*l.*); he said he durst not take the sum offered by plaintiff, nor would he suffer Mr. *Jeffreys*, the court-keeper, to admit plaintiff without payment of 165*l.* The plaintiff then paid the money demanded as a fine in order to procure admission, but said it was too much money; and plaintiff afterwards applied to Lord *Pigot* himself, and to his agent in town, Mr. *Partington*, and offered to refer the matter of the fine to counsel. Lord *Pigot* said he would not return any part of the fine received, nor would he leave it to counsel. The defendant at the trial, insisted that 10*l. per cent.* on the purchase money was the customary fine in that manor; and by estimating the estate, which was 100 acres, at 16*s. 6d.* per acre, made the two years' value amount to 165*l.* *Yates J.* said, "Fines were arbitrary formerly, the estate being held at the will of the lord; but the law having now drawn the line, and copyhold estates being permanent, no more than two years' value can be taken. The lord has a right to two years' real intrinsic value of the land, and is not to be prejudiced by any collusive lease. It was necessary for the plaintiff to show, that he did not pay the fine voluntarily, but upon compulsion. The custom to take 10 *per cent.* on the purchase money, be it of ever so long a continuance, cannot bind; the law having fixed the rate in another manner."

(*) Sel. Ni. Pri. 87. MSS.

3. OF MONEY PAID UNDER LEGAL PROCESS, &c.] — Where money has been recovered by the judgment of a court having competent jurisdiction, the matter can never be brought over again by a new action: for until the judgment is set aside or reversed, it is conclusive, as to the subject matter of it, to all intents and purposes. (a) Therefore; money paid under the compulsion of legal process, though it be afterwards discovered not to have been due, cannot be recovered back. Thus; in the case of *Marriot v. Hampton*, (b) where it appeared, that the defendant formerly brought an action against the present plaintiff for goods sold, for which the plaintiff had before paid, and obtained the defendant's receipt; but not being able to find the receipt at that time, and having no other proof of the payment, he could not defend the action, but was obliged to submit and pay the money again, and he gave a cognovit for the costs. The plaintiff afterwards found the receipt, and brought this action for money had and received in order to recover back the amount of the sum so wrongfully enforced in payment. But Lord *Kenyon* Ch. J. was of opinion at the trial, that after the money had been paid under legal process, it could not be recovered back again, however unconsciously retained by the defendant.

So, where an attorney brought an action against his client for the amount of his bill of costs, which the client paid; but afterwards had the bill taxed by the proper officer; and upon taxation, one half of the charges were struck out and disallowed; upon which the client brought an action of *indebitatus assumpsit* for money had and received against the attorney, to recover back the amount so deducted and disallowed. But it was holden, that such an action would not lie; the money having been paid under the compulsion of legal process, and the client not having, as he might have done, the bill taxed pending the action: (c) the plaintiff was accordingly nonsuited. A motion, however, was afterwards made for a rule to set aside the nonsuit, and for a new trial; but Lord *Kenyon* Ch. J. said, "I am afraid of such a precedent. If this action could be maintained I know not what cause of action could ever be at rest. After a recovery by process of law there must be an end of litigation, otherwise there would be no security for any person. I cannot therefore consent, even to grant a rule to show cause, lest it should seem to imply a doubt. It often happens that new trials are applied for on the ground of evidence supposed to have been discovered after the trial; and they are as often refused: but this goes much further." The rule was accordingly refused.

So, in the case of *Brown v. M'Kinally*, (d) which was an action of *assumpsit* for money had and received. The plaintiff and defendant

(a) Per Lord Mansfield, 3 Bur. 1009.

(c) *Gower v. Popkin*, 2 Stark. 85.

(b) 7 Term. Rep. 269. 2 Esp. 546. S.C.

(d) 1 Esp. Rep. 279.

Vide 1 Vin. Abr. 269.

being in the same line of business, entered into an agreement by which the defendant agreed to sell the plaintiff all his old iron, except bushel iron, which was of an inferior quality, at 9*l.* per ton. The iron he delivered was mixed iron of an inferior value, being part bushel iron, and charged the full value for the best sort: the plaintiff objecting to the charge, the now defendant brought an action for it. The plaintiff paid the full demand so made on him, at the same time telling the defendant, that he did it without prejudice, and meant to bring an action to recover back the overplus so paid: and this action was accordingly brought for that purpose. But Lord *Kenyon* said, "That such an action could not be maintained. That to allow it would be to try every such question twice, for that the same legal ground that would entitle the plaintiff to recover in the present action, would have been a good defence to the action brought against him by the present defendant; at which time, and in which manner he should have proceeded: that money paid by mistake was recoverable in *assumpsit*, but here it was paid *voluntarily*, and so could not be recovered under the circumstances of this case."

It has, however, been determined, that where money was recovered upon a judgment of a court of conscience, in consequence of a material part of the defendant's case having been rejected, which could not be gone into in that court, though from which it plainly appeared, that the plaintiff ought not in conscience and equity to have recovered the money; the judgment in such case is not conclusive, but the party paying the money under it, may recover it back again by action of *indebitatus assumpsit*. Thus, in the case of *Moses v. Macferlan*, (c) which was an action of *indebitatus assumpsit* for money had and received. The case, as it came out in evidence at the trial, was as follows: *Moses* (the plaintiff) had indorsed to the defendant, *Macferlan*, four several promissory notes made to *Moses* himself, by one *Chapman Jacob*, for 30*s.* each, for value received, bearing date 7th of November, 1758: and that this was done in order to enable the defendant, *Macferlan*, to recover the money in his own name, against *Chapman Jacob*. But previous to the now plaintiff's indorsing these notes, *Macferlan* assured him, "that such his indorsement should be of no prejudice to him:" and there was an agreement signed by *Macferlan*, whereby he (amongst other things) expressly agreed, "that *Moses* should not be liable to the payment of the money, or any part of it; and that he should not be prejudiced, or be put to any costs, or any way suffer by reason of such his indorsement." Notwithstanding which express condition and agreement, and contrary thereto, the present defendant, *Macferlan*, summoned the present plain-

(c) 2 Bur. 1005. 1 Bl. Rep. 219. S.C. But see 2 H. Bl. 416. where it is said by *Eyre* Ch.J. "That the judgment pronounced in this case did not satisfy Westminster Hall at the time; that he never could subscribe to it; it seemed to him to unsettle foundations."

tiff, *Moses*, into the Court of Conscience, upon each of these four notes, as the indorser thereof respectively, by four separate summonses. Whereupon *Moses*, (by one *Smith*, who attended the Court of Conscience, at their second court, as solicitor for him and on his behalf,) tendered the said indemnity to the Court of Conscience, upon the first of the said four causes; and offered to give evidence of it, and of the said agreement, by way of defence for *Moses* in that Court. But that Court rejected this defence, and refused to receive any evidence in proof of this agreement of indemnity, thinking that they had no power to judge of it; and gave judgment against *Moses*, upon the mere foot of his indorsement, (which he himself did not at all dispute,) without hearing his witnesses about the agreement, that he should not be liable: for the commissioners held this agreement to be no sufficient bar to the suit in their Court, and consequently decreed for the plaintiff in that Court, upon the undisputed indorsement made by *Moses*. This decree was actually pronounced in only one of the four causes there depending: but *Moses's* agent (finding the opinion of the commissioners to be as above-mentioned,) paid the money into that Court, upon all the four notes; and it was taken out of Court by the now defendant, *Macferlan*, (the then plaintiff in that Court,) by order of the commissioners.

All this matter appearing in evidence at the trial, there was no doubt but that upon the merits of *Moses* was entitled to recover back the money, and accordingly a verdict was given for him; but subject to the opinion of the Court upon this question, whether the money could be recovered in that form of action, or whether an action ought to have been brought upon the special agreement only? The Court were unanimously of opinion, that the gist of the action was that the defendant, upon the circumstances of the case, was obliged, by the ties of natural justice and equity, to refund the money; therefore, that the plaintiff might elect to waive any demand upon the foot of the indemnity for the costs he had been put to, and bring his action of *indebitatus assumpsit* to recover the 6*l.* which the defendant had unjustly received. Lord Mansfield Ch. J., in delivering the opinion of the Court, said, "It is most clear that the merits of a judgment can never be over-ruled by an original suit, either at law or in equity. Till the judgment is set aside or reversed, it is conclusive, as to the subject matter of it, to all intents and purposes. But the ground of this action is consistent with the judgment of the Court of Conscience; it admits the commissioners did right. They decreed upon the indorsement of the notes by the plaintiff: which indorsement is not now disputed. The ground upon which this action proceeds was no defence against that sentence. It is enough for us, that the commissioners adjudged they had no cognisance of such collateral matter. We cannot correct an error in their proceedings; and ought to suppose what is done by a final jurisdiction to be right.

But we think the commissioners did right in refusing to go into such collateral matter. Otherwise, by way of defence against a promissory note for 30s., they might go into agreements and transactions of a great value: and if they decreed payment of the note, their judgment might indirectly conclude the balance of a large account. The ground of this action is not, that the judgment is wrong; but, that (for a reason which the now plaintiff could not avail himself of against that judgment,) the defendant ought not in justice to keep the money. And at *Guildhall*, I declared very particularly, that the merits of a question, determined by the commissioners, where they had jurisdiction, never could be brought over again in any shape whatsoever. Money may be recovered by a right and legal judgment; and yet the iniquity of keeping that money may be manifest, upon grounds which could not be used by way of defence against the judgment. Suppose an indorsee of a promissory note, having received payment from the drawer (or maker) of it, sues and recovers the same money from the indorser, who knew nothing of such payment. Suppose a man recovers upon a policy for a ship presumed to be lost, which afterwards comes home: or upon the life of a man presumed to be dead, who afterwards appears; or upon a representation of a risk deemed to be fair, which comes out afterwards to be grossly fraudulent. But there is no occasion to go further: for the admission that, unquestionably, an action might be brought upon the agreement, is a decisive answer to any objection from the judgment. For it is the same thing, as to the force and validity of the judgment, and it is just equally affected by the action, whether the plaintiff brings it upon the equity of his case arising out of the agreement, that the defendant may refund the money he received; or, upon the agreement itself, that besides refunding the money, he may pay the costs and expences the plaintiff was put to. The gist of this kind of action is, that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money. Therefore, we are all of us of opinion, that the plaintiff might elect to wave any demand upon the foot of the indemnity, for the costs he had been put to; and bring this action to recover the 6*l.*, which the defendant got and kept from him iniquitously."

So, where an action is brought, and the money is paid under a compromise, and not in consequence of a judgment of the court; and it is afterwards discovered that the money was paid by mistake or deceit, it may be recovered back by action of *indebitatus assumpsit* for money had and received. Thus, in the case of *Cobden v. Kendrick*, (*f*) where the following facts appeared: an action had been brought some time before by the present defendant, as indorsee of a promissory note for

(*f*) 4 Term. Rep. 431.

150*l.* against the present plaintiff as the maker ; in which cause interlocutory judgment had been signed, and a writ of inquiry executed ; after which the cause was compromised by *Cobden's* paying part, and giving a warrant of attorney to confess judgment for the residue of the 150*l.* And in the interval, between the time when the warrant of attorney was given, and the time when the money became due, according to the defeazance thereof, *Kendrick* told *Allen*, who was his attorney in that suit, that he was glad it was settled, for that he had only given 10*l.* in cash, and his promissory note for it ; and that he knew it was a lottery transaction. This action was now brought to recover back the money so paid, on the ground of want of consideration ; and in proof that that was known to *Kendrick* at the time he took the note, *Allen* was called as a witness to speak to the conversation above mentioned, and he was admitted, after argument upon his incompetency ; and a verdict passed for the plaintiff. An objection was also taken at the trial, that this action was in effect to put the sum in litigation a second time, which had been recovered in the former action by *Kenrick* against *Cobden* ; but Lord *Kenyon* Ch. J. over-ruled it, on the ground that the money had been paid under a compromise, and not under the judgment of a court.

4. OF MONEY PAID UNDER A THREAT OF DISTRESS FOR RENT, &c.] — If a landlord threatens to distrain either for more rent than is due, or for a greater rent than that agreed upon ; and under such a threat, the tenant pays the rent demanded, he cannot recover it back, for he should then have made his stand, and have resisted any distress which the landlord might have made. Thus, in the case of *Knibbs v. Hall*, (g) which was an action of *assumpsit* for use and occupation of chambers. The defendant pleaded *non assumpsit*, with a notice of set-off for money had and received. One article of the set-off, which the defendant proposed to give in evidence, arose in the following manner. The defendant being indebted to the plaintiff for the rent of other chambers belonging to the plaintiff, which he then occupied, the plaintiff demanded payment at the rate of 25 guineas *per annum*. The defendant insisted that he had taken them at 20 guineas *per annum* only, and offered to pay at that rate. The plaintiff refused to take it, and threatened to distrain if not paid at the rate of 25 guineas ; the defendant, in order to avoid the distress, paid at that rate, and now brought a witness to prove that the chambers, for which he had paid at the rate of 25 guineas, were really let at 20 guineas, so that he had overpaid the plaintiff, and therefore proposed to set-off the surplus, as having been paid by compulsion, and in his own wrong ; but Lord *Kenyon* Ch. J. was of opinion, that this could not be deemed a payment by compulsion, as the defend-

(g) 1 Esp. Rep. 84.

ant might by a replevin, have defended himself against the distress: that therefore, after a *voluntary payment* so made, he should not be allowed to dispute its legality; and therefore rejected the evidence.

5. OF A COMPULSORY PAYMENT UNDER A COLOUR OF PROCESS, OR BY EXCESS OF AUTHORITY.]—An action of *indebitatus assumpsit* for money had and received, will lie to recover back money which has been obtained through compulsion, under colour of process, by an excess of authority against the party receiving it, although it has been paid over to the principal. Thus, in the case of *Snowden v. Davis*, (*h*) which was an action for money had and received. And the facts were, in substance, as follows, viz. that a writ of distringas had issued out of the exchequer directed to the sheriff of *Berks*, requiring him to distrain the inhabitants of the borough of *New Windsor* by their lands and chattels for the deficiency of *George Dixon* and *John Snow*, collectors, in the said borough, the several sums of 7*l.* 8*s.* 2*d.*, and 74*l.* 2*s.* 0*d.* By virtue of this writ the sheriff issued a warrant to the defendant, commanding him to distrain in the words of the writ. The defendant under colour of the warrant, demanded of the plaintiff, who was an inhabitant of the borough of *New Windsor*, the two several sums of 7*l.* 8*s.* 2*d.*, and 74*l.* 2*s.*; the plaintiff at first refused to pay the money, but upon a subsequent demand made, he paid it. On the 12th of *February* 1806, another writ of distringas issued to the sheriff of *Berks*, commanding him to distrain the said *George Dixon* and *John Snow*, collectors, the sum of 192*l.* 14*s.* 7*d.*; upon this writ the sheriff issued his warrant to the defendant, to distrain upon *Snow* and *Dixon*, the collectors there, the sum of 192*l.* 14*s.* 7*d.* upon which warrant the defendant demanded of the plaintiff that sum, and also 6*l.* 12*s.* 5*d.* for issues. The plaintiff at first refused to pay him, but the defendant took possession of his goods; upon which the plaintiff paid him both sums. The defendant proved, that before the time of bringing this action the sums levied by colour of the first writ had been paid over by himself to the sheriff, and by the sheriff into the exchequer, and that the sheriff had received his *quietus*. He also proved, that the sums levied under colour of the last writ, had been paid over by himself to the under sheriff before the action brought. *Chambre Just.*, before whom the cause was tried, directed the jury, that the plaintiff was entitled to recover the sums he had so paid, deducting the issues upon the sums mentioned in the first writ, which issues the defendant was, by the practice of the Court of Exchequer, authorized to levy. The jury found a verdict for the plaintiff for 216*l.* 13*s.* 10*d.*, being the amount of the several sums of money so paid by the plaintiff, deducting thereout 4*l.* 1*s.* 6*d.* for the issues of 1*s.* in the pound, on the amount received under the first writ. A rule *nisi* was afterwards obtained for setting

(*h*) 1 Taunt. 359.

aside the verdict, and entering a nonsuit, upon the ground, that as the money had been paid over by the bailiff to his principal, the action for money had and received could not be supported against the bailiff: the Court, however, determined, that the action for money had and received was properly brought under the circumstances of this case; and the rule was therefore discharged.

14. OF MONEY RECEIVED UNDER A VOID AUTHORITY;
WHETHER JUDICIAL OR OTHERWISE.

Money paid under a void authority may be recovered back in an action of *indebitatus assumpsit*, for so much money had and received to the use of the party paying it against the receiver. Thus, in the case of *Sir Richard Newdigate v. Davy* (i) the following facts were proved: *Sir Richard Newdigate*, the plaintiff, had a donative which he gave to the defendant, *Davy*; and afterwards he removed *Davy*, and put in *J. S. Davy* cited *Sir Richard Newdigate* in the time of *James II.* before the high commissioners, and there *Sir Richard Newdigate* had sentence against him to restore *Davy*, and to pay him all the arrears that he had received: *Sir Richard Newdigate* paid it accordingly. And after the revolution *Sir Richard Newdigate* brought *indebitatus assumpsit* against *Davy* for this money, as received to his use. *Treby* Ch. J., before whom the cause was tried, held that the action well lay; for when money is paid in pursuance of a void authority, &c. *indebitatus assumpsit* lies for it.

So, in the case of *Feltham v. Terry*, (k) where an action for money had and received was brought against an overseer of the poor, to recover money in his hands which had been levied on a conviction, but that conviction was afterwards quashed; and the court held that the action was maintainable for the clear money in the defendant's hands, because the plaintiff might waive the tort, and sue for the clear money really due.

So where A. took out administration to a person supposed to have died intestate, and appointed J. S. his attorney, who received money, &c. and paid it to the administrator; afterwards a will appearing, the letters of administration were called in, and the executor brought an *indebitatus assumpsit* against the attorney, who objected, 1st. That he acting only as an attorney for A., who in fact was administrator; the receipt of the money was not his, but the administrator's; and 2dly, That the action ought to have been a *special assumpsit*; the money being received by special authority, and that expressly to the use of another. But *Trevor* Ch. J. held, (l) that the authority being void, it was a receipt

(i) 1 Ld. Raym. 742. Bul. N. P. 183. 1216. S. P. Sed vide 1 Ld. Raym. 742. S. C. contra.

(k) Loft. 207. and cited in Cowp. 419. (l) 1 Salk. 27. pl. 14. But see Ld. 1 Term Rep. 387. Vide 2 Ld. Raym. Raym. 1210. and 4 Bur. 1986. contra.

of so much money for the use of the plaintiff on an implied contract, for which an *indebitatus assumpsit* well lies.

But in the case of *Allen v. Dundas*, (m) it was determined, that an authority given by a court, having competent jurisdiction, is not a void authority, though it may be afterwards vacated: therefore where A. stood indebted to B. for money had and received, and B. dies, after whose death C. obtains probate of a forged will, and A. not knowing of this circumstance pays the money over to him as executor, no action will lie to recover back the money so paid, notwithstanding the probate be afterwards declared null, and administration be granted to the intestate's next of kin: but if the supposed testator be living at the time of granting the probate, such action will lie; for in that case the authority is void, the ecclesiastical court having no jurisdiction.

And in all cases where the authority is absolutely void, a payment made under it is no discharge. As where the defendant, who had a house both in *America* and *London*, drew bills in *America* of the same tenor and date on their house, in favour of the plaintiffs; one of them being lost, it came into the hands of a third person, who forged an indorsement in the name of the payee, and received the amount of it from the defendants: afterwards the real payees sued them on the other bill and recovered. (n) So where A. pays a debt which he owes to B. to the attorney of a person suing A. in B.'s name, but without any authority from B., A. is still liable to B., and the attorney is answerable to A. in an action for money had and received, though he has actually paid over the money to his employer; and though he conceived that he was acting under the real authority of B.: but in point of fact the person who had employed him had forged a power of attorney in B.'s name. (o)

But in the case of *Lindon v. Hooper*, (p) it was determined, that an action for money had and received does not lie to recover back money paid for the release of cattle distrained *damage feasant*, though the distress were wrongful; the proper remedy being either by a replevin, or by action of trespass *vi et armis*.

15. OF MONEY RECEIVED *MALÂ FIDE*, OR OBTAINED BY DECEIT, MISREPRESENTATION, OR OTHER FRAUDULENT MEANS.

If money is received *malâ fide*, or obtained by deceit or misrepresentation, it may be recovered back in an action of *indebitatus assumpsit*. Thus, in the case of *Madden v. Kempster*, (q) which was an action for money had and received. The plaintiff was a marine agent at *Ports-*

(m) 3 Term Rep. 125.

(n) Ibid. 127. See also 8 East Rep. 187.

(o) *Robson v. Eaton*, 1 Term Rep. 62.

(p) Cowp. 414.

(q) 1 Campb. 12.

mouth, and the defendant carried on the same business in *London*. Captain *Hart*, an officer in the marines, had employed the defendant as his agent, but in *February* 1807 he dismissed him, and put his concerns into the hands of the plaintiff. The defendant, in the preceding *December*, had, for the accommodation of Captain *Hart*, accepted a bill for 60*l.* at four months. On ceasing to be employed by him, he went to Messrs. *Abrahams* and *Rice*, attornies in town, and agents of the plaintiff, and represented to them that there was a balance of 60*l.* due to him from Captain *Hart*. Upon this they gave him a cheque for the money on the plaintiff's banker, which was regularly paid. It appeared that the payee of the bill accepted by the defendant, had delivered it back to *Hart*, on receiving another in its stead; and the witnesses swore they believed it was at that time cancelled or destroyed. *Abrahams* and *Rice* repeatedly stated these facts to the defendant, and pressed him to return the 60*l.*, but he refused to part with it, unless he had a bond of indemnity from the plaintiff. They offered him a verbal undertaking, that he should never be sued upon the bill; but he insisted upon a security under seal. Lord *Ellenborough* Ch. J. said, "The plaintiff is entitled to recover this sum of money, the defendant having obtained it by misrepresentation. He mentioned nothing of the acceptance; he obtained it as a balance, when no such balance was due to him. He cannot therefore set up the lien, to which he might otherwise be entitled."

So, in the case of *Hogan v. Shee*, (r) which was also an action for money had and received. It was brought to recover a sum of 100*l.*, which had been given to the defendant by the plaintiff as a consideration for the defendant's procuring for his brother a place of a cadet in the service of the *East India Company*, which he had undertaken to do. The defendant had given a note, by which he promised to repay that sum within three months in case he did not procure the place within the time limited. The plaintiff proved this note, and also stated that the interest by which the defendant had represented he could procure the appointment was that of Sir *Stephen Lushington* or Mr. *Bosanquet*; the latter of whom was called to prove, that the defendant had no manner of interest with him, nor were such appointments to be procured for money. The plaintiff having discovered the deception, brought this action immediately without waiting the expiration of the three months. It was objected for the defendant, that the action could not be maintained till the expiration of that period. But in answer to this objection, it was stated by the counsel for the plaintiff, and assented to by Lord *Kenyon* Ch. J. before whom the cause was tried, "That where a contract is to be performed in a given time, and it is *bonâ fide*, no action can be brought till that time is expired, but where it is not *bonâ fide*, as where

(r) 2 Esp. Rep. 522.

a party undertakes to do any thing, and on the faith of it another pays a sum of money, and it appears such person cannot perform what he has undertaken within the time specified, so that the taking of the money was fraudulent, the party may consider the agreement as a nullity, and proceed immediately to recover back the money." The plaintiff accordingly obtained a verdict for the amount received by the defendant.

So, in the case of *Hasser v. Wallis*, (s) the plaintiff being a *feme sole* married the defendant *Wallis*, who was in truth married to another woman: *Wallis* made a lease of the wife's land, reserving rent, and received the rents from the tenants. The plaintiff afterwards discovering the former marriage, brought this action of *indebitatus assumpsit* against *Wallis* for so much money had and received to her use. And after verdict, on *non assumpsit*, it was objected, that *Wallis* having no right to receive, the tenant was not discharged, and therefore an action lay against the tenant, who had his remedy over against *Wallis*. But the court decided, that *Wallis* was visibly a husband, and the tenant discharged; at least, that the recovery against *Wallis* in this action would discharge the tenant, for this would be a satisfaction to the lessor.

So, in the case of *Thomas v. Whip*, (t) where a woman was nurse to the plaintiff's intestate, and when he died went off with the money he had about him. *Parker Ch. J.* held, that an action will well lie for money had and received to the plaintiff's use; for (he said) he would presume a subsequent agreement to make a contract of it; and the bringing the action is an admission of such consent. And he said, he knew but of two cases where the plaintiff had not such election, the one was in case of money won at play, and the other in case of money paid by a bankrupt (though on valuable consideration) after the act of bankruptcy committed; in either of which cases the action must be trover, for you cannot confirm the act in part, and impeach it for the rest. And Lord *Hardwicke* (mentioning this case) said, he always so held it, and had nonsuited many plaintiffs in actions of *assumpsit* under such circumstances.

So, if a son having a general authority to receive and pay money for his father, receive money due on a bill to his father, and give a receipt for it, as money had to his father's use, and after give it away, the father may bring trover against the donee; for his son's receipt is a good discharge of the debt, and therefore his possession is the possession of the father; the son being, as to this purpose, his servant; and the son may, in this case, be a witness (to prove the delivery to the defendant,) his evidence being corroborated by other circumstances. (*)

(s) 1 Salk 28. 11 Mod. 146. Holt. 36.
S. C.

(t) Trin. 1 Geo. I. Bul. N. P. 130.

(*) 1 Salk 289. Bul. N. P. 35.

16. IN WHAT CASES MONEY RECEIVED BY OR FROM SHERIFFS, BAILIFFS, GAOLERS, OR THEIR DEPUTIES, &c. MAY BE RECOVERED BACK.

1. OF MONEY RECEIVED BY OR FROM SHERIFFS OR THEIR OFFICERS.]

If a sheriff levies money upon a *feri facias*, the plaintiff may have an *indebitatus assumpsit* against him for so much money received to his use; (u) it also lies against his executors, if he die; for this is not like an escape, which is a wrong done by the sheriff himself, but it is founded on a duty due by the sheriff, which shall survive and charge his executors. (v) In the case of an extent it has been determined, that goods seized under an execution on a judgment at the suit of a subject, are, *before sale*, liable to be taken by virtue of an extent tested after the delivery of the *feri facias* to the sheriff; (w) and therefore it has been held that the judgment creditor cannot maintain an action for *money had and received to his use* against the sheriff, who sells under the extent, and pays the proceeds to the crown. But where the sheriff sold part of the goods seized under a *feri facias* on a *Saturday*, and part on the following *Monday*, and received the money from the purchasers before the delivery to him of an extent tested on the *Monday*, the Court of Common Pleas determined, that an action for money had and received would lie against him at the suit of the plaintiff in the *feri facias* for the amount so received. (x)

So, in the case of *M'Neil v. Perchard*, (y) which was an action of *indebitatus assumpsit* for money had and received, brought to recover the sum of 106*l.* under the following circumstances: the plaintiff being indebted to one *Parks*, a writ issued, directed to the defendants, sheriffs of *London*, to hold him to bail for that sum at the suit of *Parks*. The sheriffs directed their warrant to one of their officers of the name of *Kellett*, who arrested the plaintiff; and upon the arrest being made, the plaintiff paid into *Kellett's* hands the above mentioned sum of 106*l.*, which *Kellett* undertook to return on the plaintiff's putting in and justifying bail to the action. The plaintiff did put in and justify bail; and the present action was brought to recover the money so paid into *Kellett's* hands, which he had not returned to the plaintiff pursuant to his undertaking. And upon the trial, before Lord *Kenyon* Ch. J., the plaintiff obtained a verdict.

So, where a sheriff's officer, being in possession of the tenant's effects under an outlawry, made a distress for the rent, sold the goods so distrained, and afterwards the outlawry was reversed: it was ruled, that

(u) Comb. 430. 2 Show. 79. and *Dale v. Birch*, 3 Campb. 347.

(v) 3 Salk. 323. Cro. Car. 539.

(w) 2 Saund. 70. c. n. h. *Thurston v. Mills*, 16 East Rep. 254.

(x) *Swain v. Morland*, 1 Brod. & Bing. 370. 3 Mo. 740. S. C.

(y) 1 Esp. Rep. 263.

the officer was liable to pay the produce of the goods to the landlord, in an action for money had and received. Thus, in the case of *The President and Scholars of St. John's College, Oxford, v. Murcott*, (z) which was also an action of *indebitatus assumpsit* for money had and received. On the trial, a verdict was taken for the plaintiff, with damages 166*l.* subject to the opinion of the Court of King's Bench on the following case: On the 21st November, 1791, *William Grant*, the tenant of a farm at *Wasperton* in the county of *Warwick*, under the plaintiffs, at the yearly rent of 166*l.* was outlawed in an action of trespass on the case upon promises, at the suit of *W. Priddle*. On the 25th of April, 1792, a writ of *capias utlagatam*, directed to the sheriff of the county of *Warwick*, was issued against *Grant*; on which the sheriff, on the 7th of May 1792, issued his warrant, directed to the defendant and other persons, commanding them to seize the goods and chattels, lands and tenements of *Grant*; so that the sheriff might cause the same to be appraised and seised into his Majesty's hands. Under that warrant the defendant entered upon the farm in the occupation of *Grant*, and took possession of all the goods and chattels that *Grant* then had upon the premises. The sheriff then summoned a jury to take an inquisition by virtue of the writ on the 11th of May; but the inquisition was then adjourned to the next day, when it was taken. On the 11th of May, (the defendant being then in possession of the farm, and of the goods and chattels of *Grant*, under the said writ) the Reverend *T. Welsh*, on behalf of the plaintiffs, applied to the defendant, and informed him that a year's rent of the farm was due to the plaintiffs from *Grant*, and that he intended to distrain for it. The defendant then offered to make the distress for the plaintiffs, and said he could do it as well as another. Mr. *Welsh* then gave the defendant directions to make the distress, and accordingly, on the 12th of May, he distrained part of the effects already in his possession under the writ, but not any of the crops then growing on the premises. Being himself an auctioneer, he, on the 18th of May, sold by auction sufficient to produce the 166*l.* due for rent, and the expences of making the distress; and about a week after the sale the defendant told Mr. *Welsh* that the business was all finished; that he had lodged the money in the hands of his bankers, and it was ready whenever the *College* chose to demand it. About a fortnight afterwards, Mr. *Welsh* applied to the defendant for the money, but the defendant then told him that he had had advice upon the business; that he apprehended the distress was not legal, and he would not pay the money. The defendant continued in the occupation of the farm under the writ; and when the crops growing on the farm became ripe, reaped them, and got in the harvest. On the 4th October, 1792, the outlawry against *Grant* was re-

(z) 7 Term Rep. 259.

versed. On the 24th October, a writ of *amoveas manus*, on the reversal of the outlawry, was issued; and upon which the sheriff, on the 7th of November, issued his warrant and caused the same to be delivered to the defendant; and the defendant on the same day quitted the possession of the said farm, and the tenant re-entered. In July, 1793, after the defendant had quitted the possession of the farm, Mr. *Welsh* again applied to him for the 166*l.* but the defendant refused to pay it, saying, that he had expended money in getting in the crops upon the farm, and if *Grant* would pay him for that expence, he would pay the 166*l.* to the plaintiffs. The Court were of opinion that the plaintiffs were entitled to recover the 166*l.* as so much money received by the defendant for their use. And *Ashurst J.* said, "The instant this outlawry was reversed, the judgment of outlawry became mere waste paper, and the rights of all the parties were restored to the same situation as if no outlawry had taken place. In this case the defendant made this distress for the plaintiffs at his own request; and having received the money, he objects to pay it over to his employers on another account, with which they have no concern: but having taken upon himself to act as their bailiff, and the bar, which before existed, being now removed by the reversal of the outlawry, it appears that he has received money for the use of the plaintiffs, which in conscience he is not entitled to retain merely on account of his having some demand on the tenant."

But in the case of *Green v. Austin*, (a) it was held, that an action for money had and received cannot be maintained by a landlord to recover the amount of a year's rent against the sheriff who has sold his tenant's goods under an execution. The action in this case was brought against the sheriff of *Surrey* to recover one year's rent due to the bankrupt from a tenant, whose goods, to a greater value, the defendant had sold under a writ of *feri facias*: and it was contended, that as the sheriff, under the 8 Ann. c. 14., ought to have paid the landlord a year's rent before satisfying the execution, the price of the goods in his hands became money had and received to the landlord's use; Lord *Ellenborough*, however held, after reference to the statute, "that money had and received would not lie, and that the proper remedy was a special action on the case against the sheriff for removing the goods from the premises under the execution before the year's rent was paid to the landlord:" the plaintiff was therefore nonsuited.

An action for money had and received at the suit of a plaintiff who has sued out a *feri facias* lies against the sheriff who executed it, if he retain more money in his hands than he is entitled to do; the party injured not being bound to proceed by a summary application to the Court. (b) So, where a sheriff claimed as of right, upon a warrant issued

(a) 3 Campb. 260.

(b) *Longdill v. Jones*, 1 Stark. 345.

by him in the execution of his office, a larger fee than he was entitled to by law, and the attorney paid it in ignorance of the law, it was determined that the latter might maintain money had and received for the excess paid above the legal fee; or might set off the same in an action by the sheriff against him: and that the sheriff was not entitled to more than a fee of four-pence upon every warrant issued by him.(c)

So, where a sheriff issued a warrant on mesne process to distrain the goods of A.; but the bailiff levied the debt upon the goods of B., and paid it over: it was holden that money had and received will lie against the bailiff.(d)

Where a levy was made on the goods of a trader after he had committed an act of bankruptcy, and the money levied was paid over to the execution creditor; but afterwards an action of trover was brought by the assignees against the sheriff and his bailiff, in which damages were recovered; and these, together with the costs, were paid by the bailiff: it was determined, that there was no implied promise on the part of the plaintiff in the original suit to indemnify the bailiff, or to contribute to the damages and costs in the action of trover; but that the bailiff might maintain money had and received to recover back the levy money paid over.(e)

2. OF MONEY RECEIVED BY GAOLERS.] — If by the regulations of a prison made by the magistrates, certain rates are settled for lodging, &c. within the prison, the gaoler cannot take more than that sum; and if he does, he shall be liable to refund it, though he has paid it over to the magistrates, to whom he accounts. This was settled in the case of *Miller v. Aris*, (f) which was an action of *indebitatus assumpsit* for money had and received; and brought against the defendant, who was governor of the prison in *Cold-Bath Fields*, to recover a sum of money paid by the plaintiff, for lodging and victuals, while he was confined as a prisoner in that place of confinement. This prison is under the regulation of the magistrates of the county of *Middlesex*, by whom a particular code of printed regulations is framed for its government. And by the 25th rule of those printed regulations, "The governor is allowed to demand of every person committed for safe custody only, and not in execution, and requiring to be lodged in a better manner than the rest of the prisoners, and able to pay for a bed, the sum of 1s. for a night; and to keep one or more beds always fit for use, in case such beds should be wanting." It was proved that the plaintiff, having had one of those beds while he was in custody, had been charged and paid for it one guinea per week: to recover the overplus of which sum, above that settled by the rule, was one of the articles of the plaintiff's demand.

By another of those printed regulations, the governor is prohibited

(c) *Dew v. Parsons*, 2 Barn. & Ald. 562.

(d) *Snowdon v. Davis*, 1 Taunt. 359.

(e) *Wilson v. Milner*, 2 Campb. 452.

(f) 3 Esp. Rep. 231.

from furnishing the prisoners with victuals, or contracting for the same. The plaintiff, during the period of his confinement, had been charged and paid for victuals: to recover the money so paid, constituted the second article of his demand. In answer to the demand for lodging, the defendant relied that he accounted at the sessions to the county for the sums received on account of the gaol; that the charge of one guinea per week was sanctioned by usage, and authorized by the justices, who passed the accounts, and he gave in evidence the book kept for that purpose, containing the account of the lodging of the several prisoners; and which book was furnished to the magistrates, and contained the charge in question. The second demand for victuals was completely disproved; it appearing that the cook of the prison was the person solely interested in providing the victuals. Lord *Kenyon* Ch. J., before whom the cause was tried, said, "For the demand of victuals, the plaintiff cannot recover: but I am of opinion that the action is maintainable for the overplus money paid on account of the lodging. It is relied on for the defendant, that he is merely an agent, receiving the money from the prisoners, and paying the produce to the county. The case of *Sadler v. Evans*, 4 Burr. 1985, is relied on; it has been so laid down by very high authority in that case, that where money has been received by an agent, you cannot sue him, but must have recourse to the principal; but that is where there is no corruption in the foundation of the contract, nor is bottomed in oppression or immorality. The rules for the regulations of this prison are properly made; but prisons are not places where prisoners are to have all the conveniences and comforts of life. Gaolers are bound to treat their prisoners with humanity; but the regulations framed for the prison ought to be conformed to. These regulations have pointed out what sums ought to be taken: it should not be in the power of the gaoler to dispense with those regulations, and to enter into contracts with those in their custody, and under their controul: to allow that, might be to sanction oppression. In cases of usury, the person whose necessities prompt him to borrow, will enter into any improvident contract whatever, and submit to any terms, however excessive, to procure money: but the law will protect him, and not suffer it. In this case I think the law will interpose in the same way, and not permit such an agreement to be entered into. I am therefore of opinion, that the plaintiff is entitled to recover the money paid for the lodging, above the sum allowed by the regulations."

17. OF MONEY RECEIVED BY THE RECEIVER GENERAL OF A COUNTY FOR A PARTICULAR PURPOSE ; OR BY REVENUE OR OTHER PUBLIC OFFICERS, EITHER BY MISTAKE OR OTHERWISE.

1. FOR MONEY RECEIVED BY THE RECEIVER GENERAL OF A COUNTY.]

An action of *indebitatus assumpsit* lies upon the stat. 43 Geo. 3. c. 55. by a lessee of certain land against the receiver general of the land-tax for a county, to recover a sum of money duly assessed by a jury as a compensation to the plaintiff for his damages by reason of giving the possession and use of that land “ *during the time for which the same should be required for the public service.*” (g)

2. OF MONEY RECEIVED BY REVENUE OFFICERS.]— If duties be paid to a revenue officer by mistake, and he pays them over to his superior officer before he has notice of the mistake, an action of *indebitatus assumpsit* does not lie against him. Thus, in the case of *Greenway v. Hurd*, (h) which was an action of *indebitatus assumpsit* for money had and received. At the trial it appeared, that the action was brought to recover back 529*l.*, which the plaintiff had paid in *July* 1785 to the defendant, who was a collector of excise, for certain duties on the cotton manufacture imposed by the 24 Geo. 3. c. 40.; which act, it was admitted, had been repealed, as far as related to these duties, by the 25 Geo. 3. c. 24. before the duties were incurred; the latter statute repealing the duties “ *from and after the passing of that act,*” and, consequently, relating to the first day of the sessions, the 25th of *January* 1785. In *June*, 1785, the plaintiff positively refused to pay these duties, which, however, he afterwards paid on the 22d of *July* following. It was objected by the defendant's counsel, that as the defendant had paid the money over to his superior officer before the action was brought, the plaintiff could not recover back the money from the defendant who was a public officer, and who had been obliged, under the terrors of a penalty, to pay over this money; and that if he could, the defendant was entitled to a month's notice before the action was brought, under the 23 Geo. 3. c. 70. s. 30. which had not been given; and the judge being of this opinion, nonsuited the plaintiff. A motion, however, was afterwards made to set aside that nonsuit: but the Court were of opinion, that the action would not lie, because the money had been paid over before the action was brought, and a month's notice had not been given to the defendant.

But this form of action lies to recover back money paid to a custom-

(g) *Bingham v. Serle*, 5 East Rep. 534.

(h) 4 Term Rep. 553. Cowp. 69. Loft. 530. S. P.

house officer, which has not been paid over by him, where the duty, in respect of which he received the money, was not imposed by lawful or sufficient authority to warrant it. (i) So, *indebitatus assumpsit* for money had and received, will lie to recover back *exorbitant fees* taken by a custom-house officer: thus, in the case of *Stevenson and others v. Mortimer*, (k) which was an action for money had and received, brought by the plaintiffs, as owners of a boat employed in carrying chalk and lime from one part of the coast of *Sussex* to another, *vis.* from *East Bourne* to *Hastings*: and the action was brought to recover the whole or part of certain sums of money paid by the master of the boat, who was the plaintiff's servant, to the defendant, a custom-house officer, as his fees due upon the master's taking out a coquet and bond under an idea that this boat came within the stat. 13 and 14 Car. 2. c. 11. s. 7., by which it is enacted, "That no goods shall be shipped, or put on board, to be carried forth to the open sea from any port or place, &c., to any other port or place of the realm, without a sufferance or warrant first had and obtained; and that the master of every ship and vessel, who shall lade or take in any goods, &c. in any port, member, or creek, within the kingdom, to be landed or discharged in some other port, member, or creek, shall, before the ship or vessel be removed or carried out of the port, where he shall take in such lading, take out a coquet, and become bound, in a certificate with good security, in the value of the goods, for delivery thereof, in the port or place for which the same shall be entered; and to return a certificate of their being so landed, upon pain of forfeiting the penalty of the bond." The question intended to have been tried was, whether a coquet was necessary to be taken out under the stat. 13 and 14 Car. 2. for goods carried coastwise. But before the trial the plaintiffs gave notice, that they also meant to go upon the ground of the defendant having taken exorbitant fees: he had demanded and received 14s. 6d. Mr. Serjeant *Sayer*, before whom the cause was tried, was of opinion, that this duty being imposed by the statute upon the master, the action was wrong brought in the name of the owners, and accordingly nonsuited the plaintiff. But upon a motion being made for a rule to set aside the nonsuit, and for a new trial, the Court of King's Bench determined that the action was properly brought against the defendant, and therefore made the rule absolute. And Lord *Mansfield*, Ch. J., said: "The ground of the nonsuit at the trial was, that this action could not be well maintained by the plaintiffs, who are the owners of the vessel in question; but it ought to have been brought by the master, who actually paid the money. That ground, therefore, makes now the only question before us; as to which there is not a particle of doubt. *Qui facit per alium, facit per se.* Where a man pays money by

(i) *Campbell v. Hall*, Cowp. 204.

(k) Cowp. 805.

his agent, which ought not to have been paid, either the agent or principal may bring an action to recover it back. The agent may, from the authority of the principal, and the principal may, as proving it to have been paid by his agent. If money is paid to a known agent, and an action brought against him for it, it is an answer to such action, that he has paid it over to his principal, *Sadler v. Evans*, 4 Burr. 1984. Here the statute lays the burthen on the master from necessity; and makes him personally liable to penalties if he neglects to perform the requisitions of it. But still he is entitled to charge the necessary fees, &c., upon his doing so, to the account of his owners. And in this case, there can be no doubt of the relation in which the master stood to the plaintiffs; for he is the witness, and he swears, that the money was paid by the order of the plaintiffs. Therefore they are very well warranted to maintain the action. If the parties had gone to trial upon an apprehension that the only question to be tried was, whether this was a case within the act of parliament, consequently, whether any fee was due, the plaintiff could not have been permitted to surprise the defendant at the trial, by starting another ground upon which to recover a *Norfolk* groat. An action for money had and received is governed by the most liberal equity. Neither party is allowed to entrap the other in form. But here the plaintiff gave notice, that he meant to insist that too much was taken; and therefore both came to the trial with equal knowledge of the matter in dispute."

So, if a revenue officer seize goods as forfeited, which are not liable to seizure, and take money of the owner to release them, the latter may recover back the money in an action for money had and received; and in such an action a month's notice need not be given under the 23 Geo. III. c. 70. s. 90. Thus in the case of *Irving v. Wilson* and another, (1) which was an action of *indebitatus assumpsit* for money had and received, to recover the sum of 2*l.* 11*s.* under the following circumstances: The defendants, who were custom-house officers, had seized some hams near *Carlisle*, which the plaintiff was sending in three several carts from *Scotland* to *Carlisle*. The plaintiff obtained one permit for the whole; but owing to some accident two of the carts were at the distance of two miles behind the other: when the defendants met the first cart and demanded the permit, the driver informed them that the permit was with the other carts which came up in an hour and a half afterwards, before the first reached *Carlisle*, but not till the officer, after waiting some time without seeing the other carts, had made the seizure. They were all three driven to the custom-house at *Carlisle*, the defendants saying they could not release them unless the collector were applied to. When the whole was explained to the collector, he said he

(1) 4 Term Rep. 485.

would have no concern in the taking. And the defendants then refused to give up the carts with the cargoes, unless the plaintiff would give them 2*l.* 11*s.*; which he accordingly did. At the trial, it was objected on the part of the defendants, that the plaintiff, by this transaction with the revenue officers, had incurred a penalty of 50*l.*, and that he could not recover back the money which he had paid to have the goods, which had been seized, returned to him; and the plaintiff was nonsuited, with leave to move to set that nonsuit aside, and to enter up a verdict for him, if the court of King's Bench should be of opinion that the plaintiff could maintain this action. It was also contended, that the defendants were entitled to a month's notice under the 23 Geo. III. c. 70. s. 30. and 24 Geo. III. c. 46. s. 39.

But the court determined, that the plaintiff was entitled to recover the money in question in this form of action, and without any previous notice. And Lord *Kenyon* Ch. J. said: "The revenue laws ought not to be made the means of oppressing the subject. Here, a permit having been granted for the whole quantity of goods, and which was with the other carts behind at the time of the seizure, the seizure was clearly illegal. The permit for the entire quantity could not be separated and distributed to each of the carts. And therefore whatever ground of probability there was for stopping the first cart, yet after the matter was cleared up, there was no pretence for making a seizure; and it was highly improper in the officers to take the money. If goods liable to a forfeiture be forfeited, the officer is to seize them for the king; but he is not to be permitted to abuse the duties of his station, and to make it a mode of extortion. Here the defendants took the money under circumstances which could by no possibility justify them, and therefore this could not be called a voluntary payment; but it was extorted from the plaintiff, and in that case no notice to the defendants was necessary."

18. OF EXCESS OF TOLL RECEIVED BY TOLL-GATE KEEPERS.

If a toll-gate keeper either levies or receives toll when none is due, or if he demands and takes an excess of toll, the party paying may afterwards recover it back by action of *indebitatus assumpsit*. Thus, in the case of *Parsons v. Blandy*, (*m*) where the defendant having levied a double toll upon a waggon belonging to the plaintiffs, they made application to two justices of the peace, in pursuance of the directions of the *Bath* act; who, upon hearing the complaint, adjudged the single duty only to be due. And the defendant refusing to pay the over-toll, the plaintiffs sought to recover it by an action of *assumpsit*. Two objections were taken; first, because the proper remedy in this case under

(*m*) *Wightman's Rep.* in the Exch. 22.

the *Bath* act, was by an appeal to the Quarter Sessions; and secondly, if the action of *assumpsit* would lie, still notice ought to have been given pursuant to the directions of that act. The court, however, determined against both these objections, and *Wood* Baron said, "There are two questions to be considered: 1st. As to appeal, it is quite clear that, where a power is given to justices of the peace to determine, it is final, unless an appeal is particularly given; but looking at the appeal clause, this case is I think expressly excepted; there being a particular mode of relief appointed in this case, and as no method of recovering the money adjudged to be wrongfully taken by the collector, is given by the act, therefore the party must apply to his common law remedy. 2dly. As to notice, this is neither within the letter or spirit of the clause; the giving notice generally contemplates tort or trespass; it can never apply where a sum of money had been adjudged; the defendant requires no notice; there can be no defence, and therefore he does not want time. As to the form of the action, you shall not try title, or any thing of that nature, by an action for money had and received; but here there is nothing collateral to be tried; even if the act had said, that the justices should decree restitution, I should be inclined to think that the action for money had and received would lie."

19. OF MONEY RECEIVED BY PARISH OFFICERS FOR THE MAINTENANCE, &c. OF BASTARD CHILDREN.

An action will lie to recover back money paid to parish officers by a person taken up under a warrant as the putative father of a bastard child, by way of bargain with the parish to be released from all liability respecting the child, against those who received the money; although before the commencement of the action, they may have gone out of office, and accounted with their successors for so much of the money as was not expended on the child and its mother during her lying-in. However, in such action the plaintiff is only entitled to recover the surplus, after these charges have been deducted. This was settled in the case of *Townson v. Wilson*, (n) in which Lord *Ellenborough* Ch. J. said, "If any person gets money into his hands illegally, he cannot discharge himself by paying it over to another, and the contract under which this money was paid, was certainly illegal, as it gave the parish an interest in abridging the life of the child. When this question first came before me, on account of its novelty, I consulted the other judges upon it; and I found that they (including a noble friend of mine now no more) were of the same opinion. The chief objection to the action

(n) 1 Campb. 396. See also *Watkins v. Hewlett*, 3 Mo. 211. and *Hodgson v. Williams*, 6 Esp. Rep. 29.

appears to be, that the parties may be represented as in *pari delicto*; but that cannot be said in this instance, as the plaintiff had been arrested, and was under duress when he deposited the money with the defendants. I am of opinion, however, that there should be a deduction, by way of set off, from the 40*l.*, for so much as the defendants expended about the lying-in of the mother, and the maintenance of the infant."

So, if a promissory note is given to parish officers as an indemnity against a bastard child, they can only recover upon it so much as the parish has expended upon the child and its mother. (v) And no action at all can be maintained upon the note, if the parish has not been damaged. (p)

20. OF MONEY RECEIVED UPON AN ILLEGAL CONTRACT OR TRANSACTION, WHICH IS EITHER *MALUM IN SE*, OR *MALUM PROHIBITUM*: AND IN WHAT CASES THE PARTIES ARE CONSIDERED NOT ONLY *PARTICEPS CRIMINIS*, BUT IN *PARI DELICTO* TO SUCH AN EXTENT AS TO DEPRIVE THE PARTY PAYING THE MONEY FROM RECOVERING IT BACK FROM THE RECEIVER.

Where money has been paid upon an illegal contract, it is a general rule, that if the contract be *executed*, and both parties are in *pari delicto*, neither of them can recover from the other the money so paid; but if the contract continues *executory*, and the party paying the money be desirous of rescinding it, he may do so, and recover back his deposit by action of *indebitatus assumpsit* for money had and received. (g) And this distinction is taken in the books, namely, where the action is in affirmance of an illegal contract, the object of which is to enforce the performance of an engagement prohibited by law, clearly such an action can in no case be maintained: but where the action proceeds in disaffirmance of such a contract; and, instead of endeavouring to enforce it, presumes it to be void, and seeks to prevent the defendant from retaining the benefit which he derived from an unlawful act, there it is consonant to the spirit and policy of the law that the plaintiff should recover. (r) There are, however, some cases, notwithstanding the contract is *executed*, in which the party who has paid money under it, has been allowed to recover it back again: for though in all illegal contracts there is a degree of delinquency in both the contracting parties, yet it is deemed expedient, upon principles of public policy, in order to prevent the repetition of crimes, or the evasion of a public act of parliament, to allow the party paying the money to recover it back by action

(o) *Cole v. Gower*, 6 East Rep. 110.

(p) *Wilder v. Griffin*, 5 East Rep. 141.

(g) Doug. 470. Cowp. 199, 200. 792.

(r) Vide 1 H. Bl. 67.

of *indebitatus assumpsit* for money had and received. We will now consider the cases upon this subject under the following subdivisions :

1. OF MONEY RECEIVED UPON ILLEGAL CONTRACTS IN GENERAL.]

If a man gives his agent money to expend upon an illegal transaction, and it is expended accordingly, no action lies to recover it back. Thus, where money was given by way of a bribe, *Holt* Ch. J. said : " That though he who received it ought to be punished, yet he who gives the bribe ought not to be encouraged by any way to recover it back again." (s) But in the case of *Williams v. Hedley*, (t) which was an action for money had and received, brought to recover back money paid by the plaintiff to the defendant to compromise a *qui tam* action of usury, brought by the defendant against the plaintiff on the ground of an usurious transaction between the latter and one *Eagleton*, who had become bankrupt, it was held that such money might be recovered back by the plaintiff in this form of action. And such recovery might be had, although *Eagleton's* assignees had before recovered from the defendant the money so received by him, as money received to their use (the money paid by way of composition being at the time stated to be *Eagleton's* money); there being no evidence, at the trial of this cause, to show that the present plaintiff was privy to that suit. And Lord *Ellenborough* Ch. J., in delivering the opinion of the Court, stated the case as follows : " This was an action for money had and received, brought to recover the sum of 965*l.* 0*s.* 8*d.* as having been unduly obtained by the defendant from the plaintiff under an agreement to compromise a *qui tam* action for penalties of usury, brought by the defendant against the plaintiff on the ground of certain usurious transactions which had taken place between the plaintiff *Williams* and *Eagleton*. This sum of 965*l.* 0*s.* 8*d.* was the amount of the debt which had been owing from *Eagleton* to *Hedley* and his partner : and the jury to whom the question was left at the trial, found that the payment of this debt of *Eagleton* by the plaintiff to the defendant was obtained from the plaintiff under the terror of the above-mentioned action of usury brought by the defendant, and then depending against him, and through the means of an agreement between the parties to compromise that action ; and the plaintiff thereupon recovered a verdict against the defendant for the amount of the money he had so obtained from him. Upon the motion for a new trial two objections have been taken to the plaintiff's right to recover. The first was, that the plaintiff was *in pari delicto* with the defendant, as to the illegal compromise of the penal action ; and on that account not entitled to recover. The second objection was, that as *Eagleton's* assignees had, after his bankruptcy, re-

(s) Vide *Skin*. 412. 1 *Salk.* 22. *Cowp.* 792. But see 1 *Ld. Raym.* 89. See also *Doug.* 697. *in notis.*

(t) 8 *East Rep.* 378.

covered this money against the defendant and his partner, as money received by them for the use of the assignees, the plaintiff could not now recover the money against the defendant; the plaintiff having, as was contended on behalf of the defendant, enabled *Eagleton's* assignees to recover that money from him and his partner, and thereby estopped himself now to recover it from the defendant. But as there was no evidence given at the trial of any act done on the part of *Williams*, the plaintiff, in order to enable the assignees to recover, or which could be considered as rendering him in any degree privy to that suit, or liable for its consequences, that objection fell to the ground for want of its necessary foundation in point of fact. The first of these two objections is therefore the only one which remains to be considered. The answers given to it on the part of the plaintiff were, first, that the plaintiff, who was defendant in the action for usury, was not prohibited by the statute 18 Eliz. c. 5. s. 4. from agreeing to this composition, and paying the money which *Hedley* received under it; but that the prohibition and penalties of the statute, in this respect, solely attached upon and were confined to the *informer or plaintiff* in the penal action. Assuming, however, that the defendant, the person compounded with, is not within the express prohibitions and penalties of the act, it is still contended, that as the act of the defendant co-operated with that of the plaintiff in producing the mischief meant to be prevented and restrained by the statute in question, it is so far illegal on the part of the defendant himself, as to preclude him from any remedy by suit to recover back money paid by him in furtherance of that object; and that if he be not therefore to be considered as strictly *in pari delicto* with the plaintiff, he is at any rate *particeps criminis*, and in that respect not entitled to recover from his co-delinquent money which he had paid him in the course and prosecution of their mutual crime. In respect to the criminal offence of compounding, the plaintiff *Williams* was the person whose situation was taken advantage of by the other party to the composition; against which party the prohibitions and penalties of the statute of the 18 Eliz. are particularly levelled. It is no answer to this that *Williams* the plaintiff had been criminal in another matter, and towards another person, viz. *Eagleton*, in the usurious dealings with him; for that criminality was perfectly collateral to the offence of compounding now under consideration; and his very consciousness of those usurious dealings, and the dread of the consequences which might result therefrom, laid him more completely at the mercy of *Hedley*, and enabled him to effect the extortion which is the foundation of this action. Indeed if the objection of *particeps criminis* were allowed to hold in its full extent, none of the cases above-mentioned could have been determined; nor could the party paying usurious interest recover back the excess beyond legal interest, as he is constantly allowed to do; and which

is particularly taken notice of by Lord Mansfield in his judgment in the case of *Browning v. Morris*.(u) Upon the authority therefore of the cases which have been cited, as applied to the facts of the case before us; and founding ourselves upon the distinction taken and relied upon in those cases in favour of the party for whose benefit the provisions of the law, which has been violated, were peculiarly made, and of whose situation advantage has been unduly taken; we are of opinion that this action was, under the circumstances of this case, maintainable; and therefore that the rule for a new trial must be discharged."

Money paid in respect of transferable shares in an unincorporated company, cannot be recovered back; the society being illegal and within the statute 6 Geo. 1. c. 18., and the parties *in pari delicto*. (v)

So, in the case of *Davis v. Edgar*, (w) where the plaintiff, who was not an authorized army agent, negotiated the sale and purchase of a commission between G. C. and the defendant, at a price above that allowed by his Majesty's regulations; and the defendant, who was purchaser of the commission, after having paid a sum exceeding the regulation price to G. C., retained the 38*l.*, the remainder of the price agreed upon, with directions from G. C. to pay it over to the plaintiff for his agency, which he promised the plaintiff to do. Held that the plaintiff could not recover against the defendant the 38*l.*, as money had and received to his use, for he could not be in a better situation than G. C.; and by 48 Geo. 3. c. 15. s. 100., G. C. could not have recovered beyond the regulation price.

So, in the case of *Stokes v. Twitcher*, (x) where money was paid as a premium for an apprentice by a parent to a master under an indenture, cannot be recovered back if such indenture be void for not having the amount of the premium inserted therein, although the statutes relative to the duties payable on such indentures impose a penalty on the master alone for such omission; as the parent by executing the instrument must be considered to be aware of its illegality, and therefore *in pari delicto* with the master.

So, in the case of *Pickard v. Bonner*, (y) which was also an action of *indebitatus assumpsit* for money had and received; the facts were as follow: Mr. Bonner, the defendant, having a considerable place in the post-office, and having occasion to employ several persons as clerks to him; the plaintiff applied to one Morris, who was chief clerk in the defendant's office, to procure him such a situation, and agreed to give 100*l.* as a consideration for procuring the place. It was agreed that the plaintiff should go into the defendant's office, and continue there six months on trial; that he should have at the rate of 80*l.* per annum

(u) Cowp. 792.

(v) *Buck v. Buck*, 1 Campb. 547.

(w) 4 Taunt. 63.

(x) 2 Mo. 538. et ante 324.

(y) Peak's Cas. N. P. 221.

for that time, and afterwards a further salary, if the service continued. Afterwards the contract broke off, and it being discovered that *Morris* had paid this money over to the defendant, this action was brought to recover it back. *Morris* was called as a witness, and he swore that he did not receive this money on account of the defendant, but entirely on his own account, and that he paid it to the defendant in part of a debt due from him to the defendant, of course this action could not be supported. But Lord *Kenyon* Ch. J. said, "That had it been proved that this was a transaction between the plaintiff and the defendant, the money could not, according to the doctrine which had been laid down by Lord *Mansfield*, be recovered back; for it being for the purchase of a place under government would be illegal, and therefore the parties being *in pari delicto*, the plaintiff could not succeed in a court of justice. Lord *Holt* had been of opinion that such an action might be maintained; and his lordship said, he was inclined to agree with that opinion, though he certainly spoke with great diffidence when giving an opinion contrary to that of Lord *Mansfield*; but he thought it would be much more for the benefit of the public, if a person who had paid his money under such a contract were permitted to recover it back.

But in the case of *Walker v. Chapman*, (a) where a sum of money had been paid, in order to procure a place in the customs; but the place had not been procured; and the party who paid the money having brought his action to recover it back, it was held, that he should recover because the contract continued *executory*. So, where a person receives money to the use of another on an illegal contract, he is not allowed to retain it, but must pay it over to the person for whose use he received it. (a)

2. OF USURIOUS INTEREST RECEIVED.] By the stat. 12 Ann, stat. 2 c. 16. the taking of more than 5*l.* per cent. is declared illegal, and the contract void; the borrower, therefore, if he pays more than legal interest may recover back the excess: (b) for this statute, it is said, (c) was made to protect needy and necessitous persons from the oppression of usurers and monied men, who are eager to take advantage of the distress of others; whilst they, on the other hand, from the pressure of their distress, are ready to come into any terms, and with their eyes open not only break the law, but complete their own ruin. The borrower, however, cannot avoid the contract and recover the principal and legal interest, but only the excess of interest; although the lender is liable upon the statute, if convicted, to the penalty of treble the sum lent, which can only be recovered by action of *debt*. (d)

(a) *Loft.* 342. and cited by *Ld. Mansfield*, in *Doug.* 471. et vide *Hogan v. Shee*, ante 349.

(a) Vide *Tenant v. Elliot*, 1 Bos. & Pul. 3. *Farmer v. Russell*, ib. 296.

(b) *Bosanquet v. Dashwood*, Cas. Temp. Talbot, 38. See also *Fitzroy v. Guillem*, 1 Term Rep. 153.

(c) Per Lord *Mansfield*, Cowp. 792.

(d) *Doug.* 697. in *notis*.

It is, indeed, reported in the case of *Tomkins v. Bernet*, (c) that where three were bound in an usurious obligation, one of them paid some part of the money, and afterwards the obligee brought debt against another of the obligors, who pleaded the statute of usury, and avoided the bond: and now the obligor that had paid some part of the money without cause to the obligee, brought an *indebitatus assumpsit* against him to recover back that money; *Treby* Ch. J. allowed, that where a man pays money on a mistake in an account, or where one pays money under or by a mere deceit, it is reasonable he should have his money again; but where one knowingly pays money upon an illegal consideration, the party that receives it ought to be punished for his offence; and the party who pays it is *particeps criminis*, and there is no reason that he should have his money again; for he parted with it freely, and *volenti non fit injuria*.

But in *Smith v. Bromley*, (f) Lord *Mansfield* makes the following observation upon the case of *Tomkins v. Bernet*, "This case has been often mentioned, and I have often had occasion to look into it; but it is so loosely reported, and stuffed with such strange arguments, that it is difficult to make any thing of it. One book (g) says it was determined by Lord *Holt*; another (h) by Lord *Treby*. Certain it is, it was only a *nisi prius* case. I think the judgment may have been right, but the reporter, (*Salkeld*), not properly acquainted with the facts, has recourse to false reasons in support of it. The case must have been, as I take it, an action to recover back what had been paid in part of principal and legal interest, upon an usurious contract; and therefore the action would not lie; for so far as principal and legal interest went, the debtor was obliged, in natural justice, to pay, therefore he could not recover it back. But for all above legal interest, equity will assist the debtor to retain, if not paid, or an action will lie to recover back the *surplus*, if the whole has been paid. The reporter, not seeing this distinction, has given the absurd reason, that *volenti non fit injuria*; and, therefore, the man, who from mere necessity, pays more than the other can, in justice, demand, and who is called, in some books, the slave of the lender, shall be said to pay it willingly, and have no right to recover it back; and the lender shall retain; though it is in order to prevent this oppression and advantage taken of the necessity of others, that the law has made it penal for him to take.

So, when exorbitant and illegal interest is received upon a pledge, *indebitatus assumpsit* lies to recover it back. (i)

As the plaintiff, in this form of action, must make out an equitable

(c) 1 Salk. 22.

(f) Doug. 697. in *notis*. See also Cowp. 200.

(g) Skin. 411.

(h) 1 Salk. 22.

(i) *Atley v. Reynolds*, ante 339. See also *Fitzroy v. Gwillim*, 1 Term Rep. 153.

title to recover, so the defendant may repel it by circumstances which will, in equity, constitute a defence. Thus, in the case of *Jestons v. Brooke*, (k) which was an action for *money had and received*; and upon a rule to show cause why the verdict obtained for the plaintiff should not be set aside, and a nonsuit entered, Lord *Mansfield* reported as follows: "The plaintiff and defendant were both brokers: the defendant wanted to purchase a parcel of goods which had been distrained for rent, but had no money. He applied therefore to the plaintiff, who on the 12th of *November*, 1777, lent him 45*l.* upon his note of hand, payable on demand. At the same time it was agreed that the plaintiff should have half of the net profits, which should be made of the goods, upon the resale of them, over and above the note of hand. Two hours after the sale, payment of the note of hand was demanded by the plaintiff, in order to force the defendant to sell the whole of the goods to him; and, as an inducement, the plaintiff offered him 3*l.* profit, which the defendant refused; and sold the goods afterwards for 5*l.* profit. The plaintiff paid the 45*l.* to the landlord, by the direction of the defendant, and put a man into possession on the night of the sale. The note was repaid on the 21st of the same month. This action was brought for 2*l.* 10*s.* the half of the net profits for which the goods were resold. Towards the end of the cause it struck me, that this contract was usurious on the part of the plaintiff, because he was to have half of the profits, and was to run no risk." The jury found a verdict for the plaintiff, subject to the opinion of the court, upon the question, whether this contract was usurious or not? The Court were of opinion, that the demand of the surplus was an exorbitant demand, and therefore ought not to be recovered. And Lord *Mansfield* said: "This is an action for money had and received; and therefore it is analogous to a bill in equity. The ground of the action is to recover half the net profits arising by the resale of certain goods purchased by the defendants, as stated in the report. The general question is, whether the plaintiff ought to recover in an action for money had and received? that is, whether it is against conscience that the defendant should retain the whole profits of the goods in question to himself? There are two grounds, either of which is an answer to the action. 1st. If the contract be usurious within the statute; or, 2d. Though not usury within the statute, if it be an unconscionable bargain.

"Now to consider this case in the light of an usurious contract; There is no contrivance whatever by which a man can cover usury. Here are two brokers. One, who is the defendant, wants to buy goods that were upon sale; and the other agrees to lend him money for that purpose; but he is to lend it upon the terms of being paid both prin-

(k) Cowp. 793.

cipal and interest from the time the loan commenced. It is true, no rate of interest is reserved in the note; but is made payable on demand: from the moment of demand therefore, it would carry interest; and the plaintiff had it in his power to make demand, the very instant the bill was delivered. Besides this, he does not even trust the defendant with the possession of the money in his own hands. But when the goods are bought, and not before, he pays the money to the landlord for the defendant. Within two hours after he demands the money, and then the note begins to carry interest. He was not bound by the agreement to give credit for a moment. So that there was no sort of risk whatsoever; and, in fact, as soon as the money was paid, a man was put into possession for himself; as well as for the defendant, the note therefore was payable, with interest from the time of demanding payment, and he has possession of the goods: that was manifestly with a view to secure to himself the surplus advantage which he had stipulated for upon a resale. Both parties, from their situation, knew there would necessarily be a profit. It seems to me, therefore, that the intention of the contract was to get more than principal and legal interest upon the note, which is usury within the meaning of the statute. But suppose it were not strictly usurious, shall a man, in an action for money had and received, which is an equitable action, and founded in conscience, recover an unmeasurable and exorbitant demand as this? Most clearly he shall not. Therefore, upon either ground, the verdict must be set aside, and the nonsuit entered."

3. OF MONEY PAID TO A CREDITOR FOR SIGNING A BANKRUPT'S CERTIFICATE, OR A COMPOSITION DEED, &c.] — By the stat. 5 Geo. 2. c. 30. s. 11. "Every contract or agreement made with, or security given from the bankrupt himself, or any person on his behalf, as the consideration for signing his certificate, is absolutely void." And it has been determined, that where money is paid to a creditor, as a consideration for signing the certificate of a bankrupt, it may be recovered back by action of *indebitatus assumpsit*: for where contracts or transactions are made void by positive statutes, for the sake of protecting one set of men from another; the one, from their situation and condition, being liable to be oppressed or imposed upon by the other; there the parties are not considered *in pari delicto*.

Thus, in the case of *Smith v. Bromley*, (1) which was an action for money had and received to the plaintiff's use under the following circumstances: The plaintiff's brother having committed an act of bankruptcy, the defendant being his chief creditor took out a commission against him, but afterwards finding no dividend likely to be made, re-

(1) Sittings at Guildhall after East. 1760. coram Ld. Mansfield, reported in Doug. 696. n. 3. See also *Jones v. Bartley*, ib. 695. n. 3. *Stock v. Mawson*, 1 Bos. & Pul. 296. S. P.

fused to sign his certificate. But on frequent application and earnest intreaties made by the bankrupt to one *Oliver*, a tradesman in town and an intimate friend of the defendant, who lived in *Cheshire*, he got *Oliver* to write to the defendant several times; and he at last prevailed on the defendant to send him (*Oliver*) a letter of attorney empowering him to sign the certificate, which *Oliver* would not do, unless the bankrupt or somebody for him, would advance 40*l.*, and give a note for 20*l.* more, and which, on *Oliver's* signing the certificate for the defendant, the plaintiff, (who was the bankrupt's sister) paid, and gave to *Oliver* accordingly, who thereupon gave her a receipt for the money, promising to return it if the certificate was not allowed by the *Chancellor*: the certificate, however, was allowed. The plaintiff afterwards brought her action against *Oliver* to recover back the 40*l.*; but that action coming on to be tried before Lord *Mansfield* at *Guildhall*, at the sittings after last Trinity Term, 1759, and it then appearing that *Oliver* had actually paid over or accounted for the 40*l.* to *Bromley*, and his lordship being clearly of opinion, that such action would not lie against the plaintiff's own agent, who had actually applied the money to the purpose for which it was paid to him, the plaintiff was nonsuited, and therefore brought the present action against *Bromley* himself, which coming on to be tried, it was proved that the money was received by *Oliver*, and paid over to the defendant.

It was contended for the plaintiff, that this money was paid either without consideration, or upon one that was illegal; and in either case was recoverable back by this action. For the defendant it was argued, that there was certainly a consideration for the payment of the money, to wit, the signing of the bankrupt's certificate; that if this consideration was illegal, the plaintiff was *particeps criminis*; and had paid it voluntarily, knowingly, and without any deceit. But Lord *Mansfield* was of a different opinion, and said: "It was iniquitous and illegal in the defendant to take, and therefore it was so to detain, this 40*l.* If a man makes use of what is in his own power to extort money from one in distress, it is certainly illegal and oppressive, and whether it was the bankrupt or his sister that paid the money it is the same thing. The taking money for signing of certificates is either an oppression on the bankrupt or his family, or a fraud on his other creditors. It was a thing wrong in itself before any provision was made against it by the statute; for if the bankrupt has conformed to all that the laws require of him, and has fairly given up his all, the creditor ought, in justice, to sign his certificate; but, on the other hand, if the bankrupt has been guilty of any fraud or concealment, the creditor ought not to sign for any consideration whatever. If any near relation is induced to pay the money for the bankrupt, it is taking an unfair advantage, and torturing the compassion of his family; if it is the money of the bankrupt himself it

is giving one creditor his debt to the exclusion of the others, and a fraud upon them. As to the case cited from *Peere Williams*, 620, that only affected the person who petitioned. There might have been sufficient of the creditors in number and value to sign without him, and he had a right to compromise it upon what terms he pleased. The petitioning, or not, was intirely in his own power, and not like the present case. It is argued, that as the plaintiff founds her claim on an illegal act, she shall not have relief in a court of justice. But she did not apply to the defendant or his agent to sign the certificate on an improper or illegal consideration, but as the defendant insisted upon it, she in compassion to her brother paid what he required. If the act is in itself immoral, or a violation of the general laws of public policy, there the party paying shall not have this action; for where both parties are equally criminal against such general laws, the rule is, *potior est conditio defendentis*. But there are other laws which are calculated for the protection of the subject against oppression, extortion, deceit, &c. If such laws are violated, and the defendant takes advantage of the plaintiff's condition or situation, there the plaintiff shall recover: and it is astonishing that the reports do not distinguish between the violation of one sort and the other." The jury, under his lordship's direction, found a verdict for the plaintiff, 40*l.* damages.

So, where a creditor, after having signed a composition deed, prevailed upon his debtor to accept bills to the full amount of his debt, and afterwards received payment thereof, it was held, that such an arrangement is fraudulent, and that he is bound to refund to his debtor the excess beyond the composition. Thus, in the case of *Turner v. Hoole*, (m) which was an action of *assumpsit* for money had and received, tried at *Guildhall* sittings after Hilary Term, 1822, before *Abbott* Ch. J. And the facts proved were as follow: In *December*, 1820, the plaintiff having become insolvent, proposed to his creditors, of whom the defendant was one, to enter into a composition deed to receive 1*4s.* in the pound in full satisfaction of his debts: his attorney waited upon the defendant with this proposal, who then said, that he would do as the other creditors did; but at a subsequent interview, stated that he would not sign the deed unless he was guaranteed his debt in full. He did, however, sign the deed on the 2nd of *January*, 1821, but afterwards induced the plaintiff to accept bills to the full amount of his debt, which, though dated on the 1st *January*, before the date of the composition deed, were in fact drawn after that period. The defendant did not attend the meeting of creditors. In *March*, the plaintiff's attorney again called upon the defendant, and tendered him an instalment of 3*s.* in the pound, when the defendant told him that he

(m) Dowl. & Ry. Ni. Pri. Cas. 27. bound up in Vol. 2. of their Reports in K. B.

had bills from the plaintiff to the full amount of his debt, and that he would not receive the instalment as a composition, though he was willing to accept it on account generally. He in fact retained the money, and being afterwards desired to return it, or give a receipt for it, as an instalment of the composition money, refused to do either. The defendant was not paid any farther sum under the composition deed, but proceeded against the plaintiff upon the bills, who in consequence paid them all, deducting the amount of the first instalment: and the present action was brought to recover the sum of 18 guineas, being the amount of 6*s.* in the pound upon the defendant's original debt of 63*l.* over and above the sum agreed upon by the composition deed; namely, 14*s.* in the pound. It was contended for the defendant, that the action could not be maintained: the defendant had, in fact, never received any thing under the composition deed; for at the moment of the payment, he declared that he received it generally on account of his claim. The plaintiff had accepted bills to the full amount of that claim dated prior to the date of the deed; he had subsequently paid those bills; and he could not now be allowed by the present action to repudiate his own contracts, and annul his own acts. But *Abbott Ch. J.* ruled the contrary: and his lordship said, "The law upon this subject has been long established, and is in my opinion a wise and equitable law. The object of it is this, that one creditor shall not be allowed to get hold of all the property of an insolvent, so as to oppress a falling man on the one hand, and to injure the rest of the creditors on the other. The case is clearly within the scope of the law. The defendant signs the deed, and agrees to accept 14*s.* in the pound in satisfaction of his debt, but afterwards contrives to obtain from the plaintiff bills for the whole, and which are afterwards paid. I am of opinion that he had no right to do this. It was a fraud either upon the insolvent, or upon the other creditors; and therefore I think he is liable to refund the surplus which he has so received, namely, the 6*s.* in the pound." And the jury gave a verdict for the plaintiff accordingly for the amount.

4. OF MONEY RECEIVED ON ILLEGAL WAGERS, &c.] — If a wager be made on a boxing match, and on the event happening, the winner receives the money, it cannot be recovered back by the loser: for where one knowingly pays money upon a consideration executed, which is in itself immoral and illegal, and where the parties are equally criminal, the rule is, *in pari delicto, potior est conditio defendentis*, not because the defendant is more favoured, or entitled in conscience to retain the money, but because the plaintiff cannot make out a conscientious claim to recover it back. (n)

But where money is paid upon an illegal wager, and the person paying

(n) Vide Bul. N. P. 132. Cowp. 792. Vide ante, 272. as to money deposited with stakeholders on illegal wagers, &c.

it wishes, before the event happens which is to decide the wager, to put an end to the wager altogether, he may do so, and recover back the money so paid by action of *indebitatus assumpsit*. Thus, in the case of *Tappenden* and others, assignees of *Bray v. Randall*, (o) which was an action of *indebitatus assumpsit* for money had and received: at the trial a verdict was found for the plaintiffs, damages 216*l.*, subject to the opinion of the Court of Common Pleas, on the following case: "*Bray* duly became bankrupt, and a commission was issued against him, under which the plaintiffs were declared his assignees. On the 12th November, 1800, previous to any act of bankruptcy, in consideration of 210*l.* then paid by *Bray* to the defendant, the defendant entered into a bond in the penal sum of 999*l.*, conditioned that if the said *William Randall* shall and do, from the day of the date of the above bond, well and truly pay or cause to be paid unto the said *John Bray*, or his assigns, one annuity, or clear yearly sum of 105*l.* of lawful money of *Great Britain*, on the 1st day of *May* in each and every year, until the said *William Randall* shall prove, by evidence or otherwise, by the report of three eminent hop merchants, who shall make it appear to the satisfaction of the said *John Bray* or his assigns, that the revenue received by government by reason of the duties now assessed by parliament upon hops, shall, in the present or any one year hereafter, amount to a full and clear revenue or sum of 200,000*l.*, then the above-written bond or obligation should be void, &c. Before the bringing of this action the plaintiffs applied to the defendant, stating that they considered the bond to be illegal, and demanding the return of the 210*l.* and 6*l.* interest, which was refused.

Lord *Alvanley* Ch. J. said, "It appears to me to be clear that the plaintiffs in this case are entitled to recover back the money which has been advanced by the bankrupt. In the present transaction there was no moral turpitude whatever: and though it has sometimes been held, that where there is moral turpitude in the contract, the court will not allow the party who has advanced money on such a contract to recover it back; yet no argument of that sort can be urged in the present case. The simple statement of this case is, that after the money had been paid, but before the time had arrived at which the event in contemplation of the parties contracting was to take place, it was found out that the contract was illegal; and therefore the money paid was demanded back again. There is hardly any case of this sort in which the distinction between immoral and illegal transactions has not been taken. I do think that there is a material distinction between wagers which are not recoverable on account of some inconvenience which the public may sustain by the open discussion of the questions to which they give rise, and

(o) 2 Bos. & Pul. 467. See also *Busk v. Walsh*, 4 Taunt. 290, S. P.

those which are in themselves immoral. In the present case one party has paid money without any consideration, and is therefore entitled to recover it back from the party to whom he paid it." The other judges were of the same opinion; but the Court observed, that in an action for money had and received, nothing but the net sum advanced, without interest, could be recovered; and that the verdict must therefore be entered for the 210*l.* only.

So, in *Aubert v. Walsh*, (p) the same point was determined: and *Mansfield* Ch. J. in delivering the opinion of the Court, said, "This is an action on a wager brought to recover back the premiums paid; and it is resisted on the ground that it is an illegal wager, and that before the period at which the wager was to be determined, the plaintiff claimed the money which he had advanced to be repaid. There have been many cases cited, to prove that, in the case of payment of money on illegal transactions, *potior est conditio possidentis*; but the distinction is taken here, that the demand of the money back, before the day, was a rescinding of the illegal contract. There is, however, some doubt on the soundness of that distinction, unless accompanied with some qualification, for it does not clearly appear what is the period before which the contract may be rescinded; because a man may wait till the event of the wager may be very clearly known and foreseen; and may he then rescind the contract and save his money? However, in *Lowry v. Bourdieu*, *Buller* Just. took the distinction between a case where the event had happened, and where a man had taken his chance of winning, and the case where he had not; and that distinction was expressly adopted by the judges of this Court in *Tappenden v. Randall*, (q) which was most clearly decided on that ground; and subject to the observation above made, I think there is good sense in that distinction: and why should not a man say, you and I have agreed so and so, but the agreement is good for nothing; I cannot bind you, and you cannot bind me, and therefore I desire, before the event happens, that you will pay me back my money: this is, in fact, a relieving against the effects which an illegal contract persevered in would produce. We, therefore, are of opinion that this distinction must be supported."

But where A. illegally betted 25 guineas with B. on a horse-race, of which C., at his own request, staked ten. A. won, and paid C. ten guineas, in the expectation of receiving the whole amount of the bet from B. B., however, died, and A. never received it. Held, that A. could not recover back the ten guineas which he had paid to C., because he could not establish his claim, without going into proof of the illegal transaction, in which both were equally engaged. (s)

So, where money deposited upon an illegal wager has been paid over

(p) 3 Taunt. 277.

(s) *Simpson v. Bloss*, 2 Mars. 542.

(q) Ante, 372.

to the winner by the consent of the loser, the latter cannot afterwards maintain an action against the former, to recover back his deposit. Thus, in the case of *Howson v. Hancock*,^(t) which was also an action of *indebitatus assumpsit* for money had and received. It appeared, that the plaintiff and the defendant had laid two wagers, the one of 10*l.* and the other of 3*l.* 16*s.* on the event of a horse-race, prohibited by the statute 10 Geo. 2. c. 19. s. 2., and deposited the money in the hands of certain stake-holders. The event having terminated in favour of the defendant, both sums were paid over to him, the first by the express direction of the plaintiff, the latter, (as the jury found) with his concurrence; and the present action was brought to recover back those sums from the defendant. But the Court determined, that the plaintiff was not entitled to recover, and Lord *Kenyon* Ch. J. said, "There is no case to be found where, when money has been actually paid by one of two parties to the other upon an illegal contract, both being *particeps criminis*, an action has been maintained to recover it back again. Here the money was not paid on an immoral, though on an illegal consideration; and though the law would not have enforced the payment of it, yet, having been paid, it is not against conscience for the defendant to retain it."

5. OF MONEY PAID UPON ILLEGAL INSURANCES, &c. IN THE LOTTERY.] Money paid as a premium for illegal insurances in the lottery is recoverable back by action of *indebitatus assumpsit* for money had and received. This was settled in the case of *Jaques v. Golightly*,^(u) which was an action of *indebitatus assumpsit* for money had and received. At the trial it was proved, that, on the 1st of *January*, 1775, the plaintiff insured many lottery tickets, in various manners, at the defendant's office. The whole amount of the premiums by him paid was 64*l.* 17*s.* 6*d.* Upon some of the chances the plaintiff was a loser, in more a winner. The balance due to him was 90*l.* This the defendant refused to pay, alleging that the insuring was illegal, but insisted on retaining the premiums; and upon this evidence a verdict was found for the plaintiff, damages 64*l.* 17*s.* 6*d.* The counsel for the defendant moved for a new trial, upon the ground that the contract was void and illegal by the stat. 14 Geo. 3. c. 76. and the plaintiff entitled to no relief, because he was *particeps criminis*, and knowingly transgressing a public law. But the Court refused the rule, and determined that the plaintiff was entitled to recover; and *Blackstone* J. said, "These lottery acts differ from the stock-jobbing act of the 7 Geo. 2. c. 8. because there both parties are made criminal, and subject to penalties; but the losing party is indemnified from those penalties, in case he sues and recovers back the money lost from the winner. It was therefore necessary, in the preceding clause, to give the loser a power to maintain such an action. But here,

(t) 8 Term Rep. 575. Et ante, 372.

(u) 2 Bl. Rep. 1075. See also *Jacques v. Wilby*, 1 H. Bl. 65. S. P.

(on the part of the insured,) the contract on which he has paid his money is not criminal, but merely void ; and therefore, having advanced his premium without any consideration, he is entitled to recover it back."

So, if a servant illegally insures in the lottery, and pays the premiums of insurance with his master's money, the money so paid may be recovered back by the master in an action for money had and received against the lottery-office keeper. Thus, in the case of *Clarke v. Shee and Johnson*, (x) which was also an action for money had and received. At the trial, a verdict was found for the plaintiff, damages 45*l.* 4*s.* 4*d.* subject to the opinion of the Court, upon the following case: *David Wood* being a clerk to the plaintiff, a brewer, and receiving money from the plaintiff's customers, and also negotiable notes for the plaintiff's use, in the ordinary course of business, paid several sums with the said money and notes, at different times, to the amount of 45*l.* 4*s.* 4*d.* to the defendants, upon the chances of the coming up of tickets in the state-lottery of 1772, contrary to the lottery act of that year. The Court determined that the plaintiff was entitled to recover in this action.

But, in the case of *King v. Scrape*, (y) which was an action for money had and received brought to recover several sums of money, stated to have been paid by the plaintiff to the defendant, for illegal insurances in the lottery, in the years 1793 and 1794. A witness of the name of *Felton*, called by the plaintiff, proved that he, in the beginning of the lottery, contracted with the defendant to insure for each day of the drawing at a settled price of insurance for each day; that he made insurances with different persons on his account, which he re-assured with the defendant, reserving to himself a certain profit *per cent.* He then proved, that *King*, the plaintiff, as well as other persons, insured the several numbers which he mentioned, with him (the witness), which he daily re-assured with *Scrape*, the defendant; but added, that he never informed *Scrape* of the persons whose numbers he had insured. This transaction was in 1794. Another witness was called, who proved that in 1793, *King* had insured in that year with *Scrape*, but that 'on the balance of the account the plaintiff was in defendant's debt, the sums paid by the defendant having exceeded the money received as premiums. *Eyre Ch. J.* said, " The case of *Clarke v. Shee* does not come up to the present. There the plaintiff's money was paid over to the defendant by the plaintiff's servant; the property passed directly from the plaintiff to the defendant, and he could follow it into the defendant's possession. But in the present case, the property is changed by the intervening contract with *Felton*, and became vested in him: there is therefore no contract with the defendant in this action. Though there may be some doubt as to the situation of the witness, whether he was

(x) Cowp. 197. Loft, 756. S.C.

(y) 1 Esp. Rep. 432.

not the agent of the defendant, and the money paid to him for the defendant's use, yet as there is no direct evidence offered to support it, it must be taken from the evidence of *Felton*, to be otherwise, and the transaction to have been on his own account. And as to the transaction in 1793, as it there appears, that after payments and allowances on both sides, there was a balance in favour of the plaintiff, he therefore can have no right to maintain an action for money had and received, as he had in fact received more money than he paid." The plaintiff was therefore nonsuited.

So, money paid by the *insurer*, or lottery-office keeper, to the *insured* cannot be recovered back. Thus, in the case of *Browning v. Morris*, (a) which was an action for money had and received. The facts were as follow: The plaintiff and defendant were both lottery-office keepers; and during the drawing of the lottery, entered into an agreement mutually to insure the number of a ticket with each other, upon condition, that he whose number should be drawn on the day next following the agreement, should receive from the other an undrawn ticket, or the value of it at the market price. The defendant's number being drawn, he chose the price of an undrawn ticket, which came to 14*l.* 3*s.*, and received that sum from the plaintiff. The next day each insured another number, upon the same terms: and so the contract continued from day to day. It afterwards happened, that the plaintiff's number was drawn, when the defendant, instead of complying with the terms of the agreement, as the plaintiff had done, refused to give the plaintiff, either an undrawn ticket, or the value of one. Neither of them had any tickets in their possession, the consequence of which was, that the contract was illegal, and against the statute. But the question was whether the plaintiff was entitled, in disaffirmance of the contract, to recover back the sum which he had paid upon this illegal transaction?

The Court were of opinion that the plaintiff was not entitled to recover; for it was observed, the plaintiff did not bring his action for money paid by him to the defendant for *insuring*; but for money paid by him to the defendant in consequence of his having *insured* the defendant's tickets. So that the plaintiff was not only in *pari delicto*, but also stood in the light, and under the description of that species of insurer from whom the statute meant to protect the unwary.

(a) Cowp. 790. See also *Drummond v. Deey*, 1 Esp. Rep. 152. S. C.

21. IN WHAT CASES THIS FORM OF ACTION WILL LIE FOR FEES OR ACCUSTOMED DUES RECEIVED; AND WHICH ARE EITHER CLAIMED BY ADVERSE PARTIES, OR WHERE THE RIGHT OF TAKING THEM IS DISPUTED: AND AGAINST WHOM THE ACTION LIES.

Where a person has usurped an office belonging to another, and taken the known and accustomed fees of office; or where two persons claim title to an office, and one receive the profits, either by himself or his collector, the other may bring *indebitatus assumpsit* for money had and received, whereon the title must be proved. (b) But such action must be brought against the principal, and not against the collector. (c) So, where a person is entitled to an office with fees annexed, and a stranger intrudes into the office, and receives the fees, this form of action lies to recover them; but they must be certain, known, and accustomed fees annexed to the office, and such as the legal officer could himself recover in a court of law from the persons of whom they are claimed and received. Thus, in the case of *Boyter v. Dodsworth*, (d) which was an action for money had and received brought to recover back fees, received by the defendant to the use of the plaintiff, as belfry sexton, and church sexton of the cathedral of *Salisbury*. The plaintiff claimed under two patents in 1777, from the treasurer of the church, confirmed by the dean and chapter, granting to him for a valuable consideration the above offices for life. The one granted to him the office of belfry sexton, "together with the right and full power of keeping keys to and for the doors of the said church, with free liberty of ingress, egress, and regress into and from the said church for cleansing, showing, or otherwise officiating in the same." The other granted to him the office of church sexton, "together with all fees, wages, and profits belonging, &c. in as large and ample a manner as *S. C.*, (his predecessor,) &c. had, &c." The plaintiff having proved these patents, and stated that the defendant had lately intruded into these offices, and had received several sums of money from strangers to whom the church had been shown, *Buller J.*, before whom the cause was tried, called on the plaintiff's counsel to prove that there were certain known and accustomed fees annexed to the offices, and that the defendant had received fees, such as the legal officer could himself recover in a court of law from the persons to whom the church was shown. It was admitted that there were no such regular fees, but that it was usual for different persons to give what sums they pleased: the learned judge nonsuited the plaintiff. A motion, however, was afterwards made for a rule to show cause why the

(b) 2 Mod. 260. 263. 3 Lev. 262. 2 T. Jon. 127. 1 Danv. 27.

(c) 4 Bur. 1984. Bul. N.P. 133.

(d) 6 Term Rep. 681. See also *Green v. Hewitt*, Peake N.P. 182.

nonsuit should not be set aside, and a new trial granted : But the Court refused the rule, and determined, that money given to A. and claimed by B., as perquisites of office, cannot be recovered by B. in an action for money had and received, unless such perquisites be known and accustomed fees. And Lord *Kenyon* Ch. J. said : “ There is no ground on which this action can be supported. If there had been certain fees annexed to the discharge of certain duties belonging to this office, and the defendant had received them, an assize would have lain ; and the action for money had and received to recover fees has always been considered as being substituted in the place of an assize. But there is no pretence to say, that an assize will lie for a gratuity for money given, which the party might have refused to give if he had pleased. And with regard to natural justice, the person who performs the duty is, in justice, entitled to the money given for such duty : here the defendant, in fact, performed the service, and on principles of natural justice he is entitled to the reward. If there had been regular fees due for the duties performed, and the defendant had intruded into the offices, the plaintiff might either have supported an action for money had and received, or for disturbing him in his offices.”

So, the nominee of a perpetual curacy, not having subscribed the articles, or been licensed by the bishop, cannot maintain an action for money had and received against one who is in possession of the profits, and who likewise claims to be curate, and has been licensed by the bishop. Thus, in the case of *Powel v. Milbank*, (e) which was an action for money had and received, brought by the plaintiff, as nominee of the perpetual curacy of *Chester le Street*, against the defendant, who was in possession of the profits, and claimed likewise to be curate. At the trial, the plaintiff set up a title under Mr. and Mrs. *Jolliffe*, who had nominated him to this living as a donative, and likewise under a nomination from the Great Seal, which was directed to the bishop in the usual form of presentations. As to the title under the crown, it was proved, that this formerly belonged to the deanery of the collegiate church of *Chester le Street*, and came to the crown on the dissolution of monasteries, and continued in the hands of the crown till 16 Jac. 1., when the deanery was granted away by the crown, excepting all advowsons, donations, dispositions, and rights of patronage to all churches, vicarages, chapels, &c., and reserving the annual sum of 10*l.* to be paid to the curate for the time being. No nomination or presentation could be proved by the crown since the 16 Jac. 1., but two or three, and no more, were shown by persons claiming under the grant. The plaintiff then entered on his title under Mr. and Mrs. *Jolliffe*, and proved the nomination under their seals : that he had taken the oaths of allegiance

(e) Mich. 12 Geo. 3. B. R. 1 Term Rep. 399. n. d.

and supremacy before them, and that he produced his nomination to the bishop, and tendered himself to subscribe the articles, and make the declaration of conformity before him: but the bishop refused to suffer him to do it, because he had before licensed the defendant; and the plaintiff never was licensed by the bishop.

The Court were of opinion, that the plaintiff could not recover; and Lord *Mansfield* Ch. J. said: "It seems impossible to maintain this action against the defendant, who is completely in possession. A license is never necessary if this action can be maintained, and you may as well bring an action for money had and received, where a man is not in possession, instead of an ejectment. Here this must be taken to be a cure of souls, for it is stated to be a parish; and in that case it is expressly required that there should be a subscription."

Where fees of office are demanded and received, but the party paying them disputes the receiver's right to them, or his own liability to be charged, an action of *indebitatus assumpsit* for money had and received will lie to try the question between them. Thus, in the case of *Andrews v. Cawthorne*, (f) which was an action of *indebitatus assumpsit* for money had and received, to recover back the sum of 3s. 4d. received by the defendant, by order of Dr. *Vernon*, rector of *St. George's, Bloomsbury*, as a burial fee claimed by the Doctor for the burial of *A. M.* in the new church-yard assigned and belonging to the parish of *St. George's, Bloomsbury*, by virtue of the stats. 9 Anne, c. 22. 10 Anne, c. 11. 1 Geo. 1. stat. 1. c. 23. 4 Geo. 1. c. 14. and 3 Geo. 2. c. 19. But the burial fees of this parish had not been fixed by the commissioners mentioned in the stat. 3 Geo. 2. c. 19. The Court determined, that no burial fee is due at common law: but it may be due by custom in any particular parish: and, with respect to *St. George's, Bloomsbury*, the burial fees must first be fixed by certain commissioners, as directed by the stat. 3 Geo. 2. c. 19. before they are demandable.

So, this form of action lies to recover back monies demanded and received by one, as Mayor, which were not due to him, but to the chamberlain, who afterwards claimed the amount, and compelled the plaintiff to pay it a second time. (g)

This form of action also lies against a post-master, for receiving more money than he is entitled to for the delivery of letters, or for receiving money of a person claiming the privilege of franking. (h)

So, if A. receives rent of the tenants of B. under pretence of title, it is said, an action of *indebitatus assumpsit* for money had and received lies against him; for in such case an account will lie: and wherever account lies, an *indebitatus assumpsit* will lie. (i) But Mr. *Gwillim*, in

(f) *Willes*, 536.

(g) *Bonnel v. Foulk*, 2 Sid. 4.

(h) *Smith v. Dennis*, Loft. 753. Lord *Petre v. Lord Auckland*, 2 Bos. & Pul. 139.

(i) Per curiam, 2 Mod. 663. 12 Mod. 324. 1 Dan. Abr. 27.

his edition of *Bacon's Abridgment*, (*k*) puts this *quære*, whether, when the defendant claims title, an action of *assumpsit* for the rents received will lie against him? for he adds, that *Wilson J.*, in such an action, nonsuited the plaintiff; and was of opinion, that the mode of proceeding was either by ejectment, or where that could not be brought, by an action against the tenant for the rent wrongfully paid by him to the person not entitled to it.

So, in the case of *Littlewood v. Williams*, (*l*) where it appeared that a practice had prevailed during the incumbency of several vicars, that upon the burial of any stranger in the parish of H. certain fees should be paid, of which the vicar took one moiety, and the churchwardens the other, for the use of the poor. The fees were paid to the sexton, who paid over the moieties to the respective parties. A new vicar refused to accede to this arrangement; he buried several strangers, and procured the sexton, to whom the fees were paid, to pay over the entire fees to himself. Held, that the churchwardens might recover one moiety as had and received to their use.

But an action for money had and received cannot be maintained against a churchwarden to recover back dues, which, previous to the commencement of the action, had been paid over to the treasurer of the trustees of a chapel. (*m*)

22. OF PRIZE MONEY RECEIVED; AND WHEN THE RIGHT TO DISTRIBUTIVE SHARES MAY BE TRIED IN AN ACTION FOR MONEY HAD AND RECEIVED.

It is said (*n*) to be established upon the authority of a regular series of decisions, that the question of "prize or no prize" cannot be tried at common law, but must be tried before the judge of the High Court of Admiralty; and that the jurisdiction depends not upon the locality, or upon the parties, but upon the nature of the question, which is such, as is not to be tried by any rules of the common law; but by a more general law, the law of nations, administered by forms best adapted to the subject of its jurisdiction, and the interest of all the parties. But after the court of prize have pronounced sentence in favour of the captors, and the property captured is sold, and converted in money for the purpose of being duly distributed amongst the captors, an action at common law for money had and received will lie at the suit of any one of the captors for his share, either against the agent (*o*) who withholds it, or against the person to whom such share may have been

(*k*) 1 Vol. 260.

(*l*) 6 Taunt. 277. 1 Mar. 589. S. C.

(*m*) *Horsefall v. Handley*, 8 Taunt. 136. 2 Mo. 5. S. C.

(*n*) Vide 2 Bro. Cas. in Parl. 429. 8vo. ed.

(*o*) 4 East Rep. 238. 3 Bos. & Pul. 257. 6 East Rep. 220.

wrongfully paid. (p) So, the captor of a prize may legally assign his share therein before condemnation; and the assignee may maintain *indebitatus assumpsit* for money had and received to his use against the ship's agent for not paying it over to him after condemnation, &c. (q) But every instrument by which a seaman or marine conveys his prize money or wages in the hands of the public officers, must be drawn in the form prescribed by 26 Geo. 3. c. 63., and the statutes to which it refers, (r) otherwise it will be void.

For more concerning money had and received, vide post, tit. Principal and Agent. Partners — Infants.

(p) Doug. 324. 1 H. Bl. 261. 8 Term Rep. 224. 2 East Rep. 507. 8 East Rep. 502. 1 Taunt. Rep. 1. (r) *Turtle v. Hartwell*, 6 Term Rep. 426. *Macdonald v. Pasley*, 1 Bos. & Pul. 161.

(q) *Morrough v. Comyns*, 1 Wils. 211.

CHAPTER V.

ON PROMISES TO REPAY MONEY LENT.

MONEY lent by one person to another, may be recovered by *action* of *indebitatus assumpsit*, either upon an express or implied promise to repay the money. So, where money is advanced to B. at the request of A., who undertakes to be accountable for it, the lender may maintain an action of *indebitatus assumpsit* against A. for so much money lent and advanced to him. Thus, in the case of *Harris v. Huntback*, (a) which was an action of *indebitatus assumpsit* upon a declaration for money lent and advanced by the plaintiff to the defendant, and at his request. And upon the trial, a note of the defendant's was produced in evidence by the plaintiff, in the following words: "3d December, 1751, Received of Mr. Harris the sum of 19*l.* on the behalf of my grandson, which I promise to be accountable for on demand. Witness my hand S. Huntback." It appeared that the grandson was an infant at the time of advancing the money. The Court of King's Bench determined that this evidence was sufficient to support the declaration. And Denison J. said, "This note is evidence of money lent: and as between the plaintiff and defendant, this is certainly an original undertaking; and the money was paid at the defendant's request. And there is no privity between the plaintiff and the infant."

So, if money be lent to A. and advanced to B. at the request of A., an action of *indebitatus assumpsit* on an *implied* promise will lie against A. for so much money lent and advanced to him. (b) And the declaration, in such case, must be for money lent and advanced to A.; for money lent to a third person at another's request is bad. (c)

It has, however, been determined, that a declaration for money lent to a *feme covert* at the request of her husband is good. Thus, in the case of *Stephenson v. Hardy* (d), which was an action of *indebitatus*

(a) 1 Burr. 373.

(b) 1 Vent. 511. 2 Vent. 36. 6 Mod. 77.

(c) Carth. 446. 1 Salk 23. S. C. *Marriot v. Lister*, 2 Wils. 141. S. P.(d) 3 Wils. 588. See also *Stone v. Macnair* in error, 7 Taunt. 432. S. P.

assumpsit, and the declaration stated "That the defendant on such a day and year, was indebted to the plaintiff in 30*l.*, for money before that time lent by the plaintiff to *Ann* the wife of the defendant, in his absence, and at his special instance and request, and being so indebted he promised payment." It was proved at the trial, that the defendant being about to set out upon a voyage to *Ireland*, desired the plaintiff to lend his (defendant's) wife money, if she should have occasion for it in his absence: the plaintiff accordingly did lend her the sum for which this action was brought. At the trial, the plaintiff obtained a verdict. But the counsel for the defendant afterwards moved the court in arrest of judgment, upon the ground that a husband cannot be indebted for money lent to his wife, because she cannot contract or borrow money; but they said, that if it had been alleged that the defendant was indebted in so much money advanced by the plaintiff to *Ann*, the wife of the defendant, at his instance and request, it would have been right enough; but they argued that the word *lent* was a technical term, the legal idea or meaning of which is so certainly established and fixed, that it is as impossible for the husband to be indebted for money lent to his wife, as it is for A. to be indebted to B. for money lent to C., a third person, and cited *Marriot v. Lister*, 2 Wilson, 141. and 1 Salk. 23. 2 Vent. 36. But Lord Chief Justice *De Grey* said, "It is admitted, that if the word advanced had been inserted in the count instead of the word lent, it would have been good: Now, I think, (in this case,) the word lent is the same as the word advanced; and that this is not like the cases cited, which are good law; I think that a loan to the wife, at the request of the husband, is the same in law, as if the loan had been to the husband himself." And of this opinion were all the other judges. The motion for arresting the judgment was therefore discharged.

Where money is lent on a pledge, the lender may recover it by action of *indebitatus assumpsit*, unless there be a special agreement to stand to the pledge only. This was determined in the case of the *South-Sea Company v. Duncomb*, (e) upon a trial at bar, in an action for money lent, it appeared that 8000*l.* was advanced to the defendant by the plaintiffs in 1720, upon a pawn of 2000*l.* stock. And the defendant not repaying it, the question to be tried was, whether the plaintiffs could proceed against the person of the defendant, or must stand to the remedy against the stock. And after proof of many particulars, to induce a belief that in these loans no regard was had to personal security; the court left it to the jury upon this point, that where money is generally lent upon a pledge, it will not deprive the lender of his remedy against the person; and that to discharge the

(e) Stra. 919. 2 Barnard. Rep. B. R. 48. S. C.

person of the borrower, there must be a special agreement to stand to the pledge only." The jury accordingly found for the defendant.

But in the case of the *Governor and Company of the Bank of England v. Glover*, (f) which was an action of *indebitatus assumpsit* brought by the plaintiffs against the defendant for 454*l.* 18*s.* 3*d.* lent to the defendant by the plaintiffs: and at the trial, before *Holt* Ch. J., the case in evidence was as follows. "The defendant, *January* 31st, 1700, brought a note of Mr. *Shepherd*, a goldsmith, payable to *Robert Stamper*, for 454*l.* 18*s.* 3*d.*, to the Bank of *England*, and prayed Mr. *Maddocks*, the cashier of the bank, to give him a specie bank note payable to the said *Stamper* for the said note of *Shepherd*; which Mr. *Maddocks* refused, but told the defendant, that if he would promise to pay the bank the 454*l.* 18*s.* 3*d.* in case *Shepherd* did not pay the said note, he would give him a specie bank note, payable to himself, for the said sum; to which the defendant agreed. Whereupon Mr. *Maddocks* accepted *Shepherd's* note, and gave the defendant, *Glover*, a specie bank note of 454*l.* 18*s.* 3*d.* This was done upon the *Friday*. On the *Monday* following *Shepherd's* note was sent to him to be paid, but *Shepherd* refused to pay it. In the mean time *Glover* gave this bank note to *J. S.* for a debt owing by him to *J. S.*, and *J. S.* received the 454*l.* 18*s.* 3*d.* of the bank." And after debate by the counsel on both sides, *Holt* Ch. J. was of opinion, that this evidence did not maintain the action. For (by him) this was not money lent, nor laid out for the use of the defendant; but it was a buying of the note of *Shepherd*, with a warranty of it from the defendant; and therefore the plaintiffs might well maintain a special action, but not a general *indebitatus assumpsit*. It was urged by the plaintiffs' counsel, that this note was only a *depositum* or pledge. But to that the Chief Justice answered, that that could not be, because it was not redeemable by the defendant; and redemption is incident to the nature of a pledge. The plaintiffs therefore were nonsuited.

If A. lend stock in the public funds to B., it cannot be recovered in an action of *indebitatus assumpsit* as money lent; but the lender must declare specially upon the promise of the borrower; because stock is not considered as money. (g)

Money lent to game with, or to pay a gaming debt, is recoverable by action of *indebitatus assumpsit*; for the statute 9 Anne c. 14. s. 1. only avoids securities given upon a gaming consideration, but does not extend to loans. And upon this subject the following decisions have been made: in the case of *Barjeau v. Walmsley*, (h) which was an action of *indebitatus assumpsit* for money lent: it appeared that the plaintiff and defendant gamed together, at tossing up for five guineas at a time: and

(f) 2 Ld. Raym. 753.

(h) 2 Stra. 1249. See also 1 Bl. Rep.

(g) 5 Burr. 2589. 2 Bl. Rep. 684. 260.
1 East. Rep. 1.

the plaintiff having won all the defendant's ready money, lent him ten guineas at a time, and won it, till the defendant had borrowed one hundred and twenty guineas. Upon the trial it was contended that, by the stat. 9 Ann. c. 14. the plaintiff could not maintain this action, because that statute avoids all securities entered into or executed for money knowingly lent and advanced to game with; and the borrowing on an agreement to pay is a security. But *Lee Ch. J.* held this was not a case within the act; for there is not the word *contract*, as in the statute of usury; and he said, "the word *securities*, as it stands in this act, must mean lasting liens upon the estate. The Parliament might think there would be no great harm in a parol contract, where the credit was not like to run high; and therefore confined the act to neither securities." Wherefore the plaintiff obtained a verdict for 126*l.*

So, in the case of *Alcinbrook v. Hall*, (i) which was also an action of *assumpsit* for money paid. The case was this: viz. the defendant having lost a sum of money above 10*l.* upon a bet at a horse-race, requested the plaintiff to pay it for him, which he did. The defendant objected, that this money being lost at gaming, and recoverable back again by the stat. 9 Ann. c. 14. no action would lie: but the Court held that this was not a case within the statute; for there is not the word *contract*, as in the statute of usury; and judgment was given for the plaintiff.

So, in the case of *Robinson, Esq. v. Ann Bland*, administratrix of *John Bland, Bart.*, (k) which was also an action of *assumpsit*; and the declaration contained three counts. The first count was upon a bill of exchange drawn at *Paris*, by the intestate, *Sir John Bland*, on the 31st of *August*, 1755, on himself in *England*, for the sum of 672*l.* sterling, payable to the order of the plaintiff, ten days after sight, value received, and accepted by the said *Sir John Bland*. The second count was for 700*l.*, monies lent and advanced by the said plaintiff to the said *Sir John Bland*, at his request. The third count was for 700*l.* monies had and received by the said *Sir John Bland*, to and for the use of the plaintiff. At the trial, a verdict was found for the plaintiff, damages 672*l.*; subject to the opinion of the Court of King's Bench, on the following case, which stated, "That the bill of exchange was given at *Paris* for 300*l.* there lent by the plaintiff to *Sir John Bland*, at the time and place of play; and for 372*l.* more lost at the same time and place, by *Sir John Bland*, to the plaintiff, at play; that the play was very fair; and there was not any imputation whatsoever on the plaintiff's behaviour; that there were several gentlemen and persons of fashion then and there at play besides the plaintiff and *Sir John Bland*; that in *France*, money lost at play, between gentlemen, may be recovered as a debt of honour before the marshals of *France*, who can enforce obedience to their sen-

(i) 2 Wils. 309.

(k) 2 Burr. 1077.

tences by imprisonment, though such money is not recoverable in the ordinary course of justice ; that money lent to play with, or at the time and place of play, may be recovered there, as a debt in the ordinary course of justice, there being no positive law against it ; that Sir *John Bland* was, and the plaintiff is a gentleman." The question for the opinion of the Court was, whether, under these circumstances, the plaintiff was entitled to recover any thing and what, against the defendant ? The Court determined that the plaintiff could not recover upon the count on the bill of exchange, nor for the money won at play ; but that he was entitled to recover on the second count for the amount of the money lent. And Lord *Mansfield* Ch. J. said, " In the present case the facts stated scarce leave room for any question ; because the law of *France* and of *England* is the same. The first question is, whether the plaintiff is entitled to recover upon this bill of exchange by force of the writing. The second question is, whether he is entitled to recover upon the original consideration and contract, by the justice and equity of his case, exclusive of any assistance from the bill of exchange, and taking that to be a void security. As to the first question, the defendant has objected that the consideration of the bill of exchange is wholly money won and lent at play : therefore, by force of the writing, the plaintiff cannot by the law of *England* recover ; such security being utterly void ; and no doubt the law of *England* is so.

" Then as to the other counts for money had and received to the plaintiff's use, and for money lent and advanced to him. Consider it distinctly, as to each part ; the money won, and the money lent. First, as to the money won. By the rule of the law of *England* no action can be maintained for it. To this it has been objected, that the contract was made in *France* : therefore, *ex comitate*, the law of *France* must prevail, and be the rule of determination. I admit that there are many cases where the law of the place of the transaction shall be the rule ; and the law of *England* is as liberal in this respect as other laws are. This is a large field, and not necessary now to be gone into. The point that the defendant must rest upon, in the present case, is this ; the money was won in *France* ; therefore it ought to be governed by the law of *France* ; and it is recoverable there before the marshals of *France*, who can enforce obedience to their sentence. The parliament of *Paris* would pay no regard to their judgment, nor carry it into execution. The marshals of *France* proceed personally against gentlemen, as to points of honour, with a view to prevent duelling. They could not have taken cognisance of the present matter. It was not within their jurisdiction : it was no breach of honour in *France* : for the money was payable in *England* ; and Sir *John Bland* could not be said to have forfeited his honour till the ten days were out, and till the money had been demanded in *England*, and payment refused there. Sir

John Bland was actually dead in a very short time after he gave the note. The marshals of *France* can only proceed personally against the gentleman who loses the money, but have no power over his estate or representatives after his death. Therefore, as to the money won, the contract is to be considered as void by the law of *France*, as well as by the law of *England*, which makes it unnecessary to consider how far the law of *France* ought to be regarded."—Next, as to the money lent: The sense of the legislature seems to me to be agreeable to the cases that have been cited. The act of 16 Car. 2. c. 7. s. 3. does not meddle with money lent at play, but as to money (exceeding 100*l.*) lost and not paid down at the time of losing it, it says, "that the loser shall not be compellable to make it good, but the contract and contracts for the same, and for every part thereof, and all securities shall be utterly void," &c.—The words 'contract and contracts for the same,' are not in 9 Ann, and I dare say were designedly left out: it only says, "that all notes, bills, bonds, judgments, mortgages, or other securities, &c. for money won or lent at play, shall be utterly void," &c. Here the money was fairly lent without any imputation whatsoever. *Sir John Bland*, the borrower of it being in a foreign country, might very naturally have been distressed under his then situation amongst foreigners for want of having ready money, or knowing how to procure it: and it might be even a kind and generous, and commendable act to lend it to him at that time, to extricate him from his difficulties as he was then circumstanced. The jury have left it quite open to the court to determine whether any thing, and what, is recoverable. As to the money won, we think it cannot be recovered: as to the money lent, the plaintiff is entitled to it, both by the law of *England* and by the law of *France*."

So, in the case of *Wettenhall v. Wood*, (*l*) which was an action of *indebitatus assumpsit* for money lent. The defence set up was, that the plaintiff kept a common gambling house; that the defendant being there at play with several other persons, and having lost all his money, applied to the plaintiff for the loan of some money, for the purpose of continuing the play, when the plaintiff lent him the sum for which the present action was brought. Lord *Kenyon* Ch. J., before whom the cause was tried, was clearly of opinion, "that this money was recoverable; for that the statute 9 Ann. c. 14. only avoided securities for money lent to play with, and did not extend to cases of mere loans, without any security taken." He therefore directed a verdict for the plaintiff.

But in the case of *Cannan v. Bryce*, (*m*) it was determined, that money

(*l*) 1 Esp. Rep. 18. Et vide *Alcinbrook v. Hall*, ante 385. (*m*) 3 Barn. & Ald. 179.

lent and applied by the borrower for the express purpose of settling losses on illegal stockjobbing transactions cannot be recovered by action; the act of paying as well as receiving being expressly prohibited by the 5th section of the stockjobbing act 7 Geo. 2. c. 8.

So no action lies for money lent for the ransom of a ship, contrary to the stat. 45 Geo. 3. c. 72. (n)

(n) *Webb v. Brooke*, 3 Taunt. 6.

CHAPTER VI.

ON EXPRESS AND IMPLIED PROMISES TO REPAY MONEY PAID AND EXPENDED FOR THE USE OF ANOTHER.

WHERE a person has paid and expended his own money for the use of another, either at his request or by compulsion, the law raises an implied promise of repayment, and upon which an action of *indebitatus assumpsit* will lie. (a) The subject of the present chapter will be considered under the following heads: viz.

1. OF MONEY PAID AND EXPENDED FOR ANOTHER, EITHER UPON AN EXPRESS OR IMPLIED REQUEST: AND IN WHAT CASES AN ACTION OF *INDEBITATUS ASSUMPSIT* WILL LIE TO RECOVER THE MONEY SO PAID.
2. OF VOLUNTARY PAYMENTS MADE WITHOUT REQUEST, AND THE PARTY PAYING NOT BEING UNDER ANY LEGAL LIABILITY TO PAY, &c.
3. OF PAYMENTS MADE ON ACCOUNT OF ANOTHER UNDER A DISTRESS FOR RENT, IN ORDER TO REDEEM THE GOODS, &c. DISTRAINED: AND OF PAYMENT BY A TENANT OF THE LANDLORD'S TAXES, &c. AND WHEN SUCH PAYMENTS MAY BE RECOVERED BY ACTION OF *INDEBITATUS ASSUMPSIT*.
4. OF MONEY PAID FOR ANOTHER UPON BILLS OF EXCHANGE, PROMISSORY NOTES, OR OTHER SECURITIES.
5. OF MONEY PAID OR SECURITIES GIVEN BY A SURETY OR BAIL ON BEHALF OF THEIR PRINCIPAL.
6. OF CONTRIBUTION BETWEEN CO-SURETIES, OR OTHER PERSONS JOINTLY LIABLE FOR A DEBT OF THEIR PRINCIPAL: AND FOR CON-

(a) 3 Bl. Com. 163. Carth. 446.

TRIBUTION AMONGST CO-DEFENDANTS FOR DAMAGES RECOVERED AGAINST THEM JOINTLY EITHER FOR A TORT OR TRESPASS COMMITTED BY ALL OF THEM.

7. OF CONTRIBUTION BY THE OWNERS OF ADJOINING PROPERTY TOWARDS THE BUILDING, &c., OF PARTY WALLS, AND OF THE STATUTE RELATING THERETO.

8. OF A COMPULSORY PAYMENT OF THE DEBT OF ANOTHER, MADE EITHER BY AN ATTORNEY, SHERIFF, GAOLER, OR OTHERS.

1. OF MONEY PAID AND EXPENDED FOR ANOTHER EITHER UPON AN EXPRESS OR IMPLIED REQUEST : AND IN WHAT CASES AN ACTION OF *INDEBITATUS ASSUMPSIT* WILL LIE TO RECOVER THE MONEY SO PAID.

If money be paid by A. at the request of B. to a third person, or if it be expended in the purchase of goods, or in payment for work, &c. on B.'s account, an action of *indebitatus assumpsit* for money paid will lie at the suit of A. against B. for the amount of such money either upon an express or implied promise of repayment. Thus, in the case of *Alcinbrook v. Hall*, (b) which was an action of *indebitatus assumpsit* for money paid by the plaintiff for the defendant at his instance and request. The defendant having lost a sum of money, above ten pounds, upon a bet at a horse-race, requested the plaintiff to pay it for him, which he did ; the defendant objected, that this money being lost at gaming, and recoverable back again by the statute 9 Ann. c. 16., this action would not lie ; but the court held, that this was not a case within the statute ; for there is not the word contract as in the statute of usury ; and gave judgment for the plaintiff.

So, where a dinner was ordered at a tavern by the authority of two persons who had laid a wager of a *rump and dozen*, whether the one was older than the other ; if the winner pays the bill, he may maintain this form of action against the loser to recover the amount so paid. (c) But no action will lie for money paid for settling losses on illegal stock-jobbing transactions ; such payments being expressly prohibited by the stat. 7 Geo. 2. c. 8. s. 5., (d)

Where a carrier, by mistake, delivered to B. goods consigned and sold to C., and B. appropriated the goods to his own use ; and the carrier afterwards on demand and without action, paid to C. their

(b) 2 Wils. 309. Et vide ante 385.

(c) *Hussey v. Crickitt*, 3 Campb. 168.

(d) *Cannan v. Bryce*, ante 387.

value; it was held, that the carrier might recover the amount against B., as money paid to B.'s use; but not as the price of goods sold and delivered to B. (e) But in a subsequent case of *Lills v. Laing*, (f) which was an action for money paid; where at the trial before Lord *Ellenborough* Ch. J., it appeared in evidence that the plaintiffs being wharfingers had a quantity of canvass left at their wharf consigned to a person of the name of *Fletcher*: but, by mistake, it was carried away by the defendant, who had cut it up into sails before he discovered that it was not intended for him. The plaintiffs were then called upon by *Fletcher* for the value of the canvass, which they accordingly paid; and for the amount of which, the present action was brought, as so much money paid to and for the use of the defendant: on behalf of the plaintiffs it was contended, that they might waive the *tort* committed by the defendant in carrying away the canvass from their wharf, and that the law would raise a promise on his part to repay to them the money, which they had been compelled to pay by his default. But his lordship held that the plaintiffs ought to have declared specially, and directed a nonsuit.

So an action for money paid cannot be maintained unless there be a request to pay it either express or implied. And therefore in the case of *Lightfoot v. Creed*, (g) which was an action of *indebitatus assumpsit* for money paid. The facts were as follow: the defendant on the 23d October, had sold to the plaintiff 3000*l.* three *per cent.* consols, to be delivered on the 30th of the same month; that on that day, stock having in the meantime risen in price; the defendant refused to make the transfer; in consequence of which, the plaintiff employed a broker to purchase stock to the same amount, which was accordingly transferred to the plaintiff on the 31st; that the loss sustained by the plaintiff, by the defendant's not performing his contract, was 45*l.*; and that the defendant after the action commenced offered to pay that sum without costs. This action was brought to recover the 45*l.* But the Court determined that the plaintiff could not recover that sum in this form of action; for he ought to have declared specially upon the contract. And *Gibbs* Ch. J. said, "The defendant contracted to transfer stock on a certain day: if he did not transfer the stock on that day, the plaintiff was entitled to call on him to make good, in the shape of damages, the loss sustained by the defendants for the non-performance of his contract. Instead of that, the plaintiff purchases the stock, and sues the defendant for the difference, who never authorised him to purchase it, either expressly or impliedly. From the circumstance of the defendant's having offered to pay the 45*l.*, it cannot be shewn that the plaintiff thus laid

(e) *Brown v. Hodgson*, 4 Taunt. 189.

(g) 8 Taunt. 268.

(f) 4 Campb. 81.

out this money for the defendant's use. The plaintiff's claim on this count, therefore, cannot be supported."

2. OF VOLUNTARY PAYMENTS MADE WITHOUT REQUEST;
AND THE PARTY PAYING NOT BEING UNDER ANY LEGAL
LIABILITY TO PAY, &c.

No person can by a *voluntary payment* of the debt of another make himself that man's creditor, and recover from him the amount of the debt so paid. (h) So, where money is paid against the express consent of the party for whose use it is supposed to have been paid, no action will lie for the money so paid. Thus, in the case of *Stokes* and another, overseers of *St. Vedast*, otherwise *Foster v. Lewis* and another, overseers of *St. Michael's Le Quern*, (i) which was an action for money paid, laid out, and expended by the plaintiffs, to the use of the defendants; and the question arose upon the payment of a sexton's salary. At the trial before Lord Mansfield Ch. J., it appeared, that by the act 22 and 23 Car. 2. c. 11. which was an additional act for rebuilding the city of London after the great fire, and uniting parishes, &c., amongst others, the parishes of *St. Vedast's* and *St. Michael Le Quern* were united; and that, since that time, one set of officers had served for the two parishes, the election of whom had always been made at a joint vestry; that only nine vacancies in the office of sexton had happened since, all of which had been filled up agreeably to this custom; that, in the year 1759, the sexton's salary was fixed at 20*l.* per annum, which was agreed to be paid equally by both parishes; that the overseers of *St. Vedast's* had paid the sexton who was last chosen the whole sum; to recover a moiety of which this action was brought. The defence set up was, that the last election of a sexton was not a joint one; and that the parish of *St. Michael's* claimed a right of choosing a separate sexton for themselves; of which they had given notice to the other parish. The Court were of opinion that this action could not be maintained; and Lord Mansfield Ch. J. said, "The dispute arises concerning the election of a sexton, and the way of trying it is by refusing to pay the sexton elected; the whole is notoriously in litigation. Under these circumstances, therefore, one parish paid the *quota* of the other in spite of their teeth: then, can it be said that this action for money paid, laid out, and expended, will lie? certainly not. This action must be grounded either on an *express* or *implied* consent; here is neither. Another strong objection to this action is, that it is trying the right of the sexton without his being a party to it."

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(h) Per Lord Kenyon, 8 Term Rep. 613. 310, (i) 1 Term Rep. 20,

3. OF PAYMENTS MADE ON ACCOUNT OF ANOTHER UNDER A DISTRESS FOR RENT, IN ORDER TO REDEEM THE GOODS, &c., DISTRAINED : AND OF PAYMENT BY A TENANT OF THE LANDLORD'S TAXES, &c.

1. OF PAYMENT OF ARREARS OF RENT UNDER A DISTRESS.] — The goods of A. on the premises of B. C. and D. were distrained by the landlord for rent in arrear ; and A. was obliged to pay the rent to redeem them. It was held that A. might maintain an action of *assumpsit* for money paid to the use of B. C. and D. although the two latter had previously assigned their interest in the premises to B. Thus, in the case of *Esall* against *Partridge* and two others, (k) which was an action upon promises for money paid, &c.: at the trial before Lord Kenyon Ch. J., it appeared, in evidence, that the three defendants were lessees of certain premises, by deed, from one *Welch*, to whom they thereby covenanted to pay the rent, and that two of the defendants afterwards, with the plaintiff's knowledge, assigned their interest to *Partridge*, the other co-lessee, who was a coach-maker : subsequent to which assignment, the plaintiff put his carriage upon the premises, under the care of *Partridge*, where it was taken as a distress by *Welch*, the landlord, for rent in arrear. And the plaintiff, in order to redeem it, was obliged to pay the rent due, taking at the time a receipt from *Welch's* attorney, as for so much received on account of the three defendants. The action was brought to recover that sum ; but the plaintiff was nonsuited, on the ground that the action should have been brought against *Partridge* alone, he being the person in the sole possession of the premises at the time, with the knowledge of the plaintiff, who had trusted him only with the possession of his property, and he also being the person ultimately responsible to the other two defendants ; and therefore it was said that the money must be taken to have been paid to his use only. However, upon a motion to set aside this nonsuit, his lordship changed his opinion ; and the court, after argument, determined that the action was rightly brought against the three defendants, who were all liable by their covenant to pay the landlord the rent in question."

But if the goods had been sold under the distress, and the landlord had received the money, this form of action could not be maintained. (l)

2. OF PAYMENT OF LANDLORD'S TAXES, &c. BY A TENANT.] Where the tenant of premises under a lease, and at a rent payable half-yearly, agreed to pay all taxes except the landlord's property-tax, which the landlord agreed to allow, and the tenant agreed to lay out 20*l.* in re-

(k) 3 Term Rep. 308. 3 Esp. Rep. 8. S. C.

(l) *Moore v. Pyrke*, 11 East 52. See also *Greaves v. Hepke*, 2 Barn. & Ald. 151.

pairs, which the landlord also agreed to allow ; but afterwards distrained for half a year's rent, and sold to the whole amount, without allowing either for repairs or property-tax, which he knew the tenant had paid to the collector : it was determined that the tenant might recover, in respect of the *property-tax*, but not in respect of the *repairs*. (m) So, in the case of *Dawson v. Linton*, (n) where the question was as to the liability of the defendant to repay to the plaintiff the sum of 20*l.* 14*s.* for a drainage-tax. It appeared, that the plaintiff had been tenant to the defendant of a farm situate within a certain district, liable to a drainage-tax of 1*s.* per acre : he paid his rent in full to the defendant ; and quitted the farm on the 6th of *April*, 1820, but did not pay the drainage-tax then due. When he quitted, by the permission of the incoming tenant he left a stack of wheat on the premises. A demand being, in *July*, 1820, made on the incoming tenant by the collector for the year's drainage-tax due 6th of *April*, 1820, the tenant refused to pay it ; and a warrant of distress having been obtained, the plaintiff's stack of wheat was distrained, and in consequence the plaintiff was obliged to pay the amount of the tax. By the local act it was provided, that the tax should be paid by the tenants of the lands and grounds charged with the same respectively ; and that such tenants should and might deduct and retain the same out of the rents payable to their landlord ; and also that in case of neglect to pay, the tax might be levied by distress on the goods and chattels which should be found on the lands charged with the tax in arrear ; and if the same should be untenanted, or no sufficient distress could be found, the lands and grounds chargeable should remain as a surety for the payment thereof, and might be taken possession of, and let in discharge of the tax. It was contended at the trial, that the succeeding tenant was liable for the tax, and therefore that the action should have been against him. The plaintiff, however, had a verdict. And the Court of King's Bench were of opinion that that verdict was right. And *Abbott Ch. J.* said, " It is clear that this tax must ultimately fall on the landlord, and that the plaintiff has paid his money in discharge of it ; he has, therefore, a right to call upon the landlord to repay it to him. I think the meaning of the act was to make the tax payable by the tenant in whose time it became due, and who received the benefit of the drainage. If it had then been paid, the plaintiff might have deducted it from his rent ; but as he was not called on to pay it till after the rent had been paid, I think he has now the right to require the landlord to reimburse him. It might be very hard if the new tenant were to be compelled to advance money to pay the tax for his predecessor, even though ultimately he would be entitled to recover it. Here the action is only for money paid for the de-

(m) *Graham v. Tate*, 1 Maule & Sel. 609. (n) 5 Barn. & Ald. 521.

fendant, and not for any special damage arising from the distress. The verdict is therefore right."

But where a tenant continues to pay the landlord's taxes for several successive years, without deducting them out of his future rent, he cannot recover them by action at law. Thus, in the case of *Spragg v. Hammond*, (o) which was an action brought to recover the sum of 48*l.* 5*s.* 1*d.* as so much paid by the plaintiff to the defendant's use: the facts of the case were these: The plaintiff held certain premises under a lease from the defendant, the lease being silent as to the payment of the land-tax. In 1814, the defendant distrained; and at that time insisted on the payment of the rent in arrear, refusing to let the land-tax be deducted; and accordingly received his rent in full, alleging that he had nothing to do with the tax in question. The plaintiff about this time or shortly after (*viz.* on the 13th December, 1814,) applied by his attorney to have the sums so paid refunded, and protested against his future liability to pay. The defendant, however, still refused to deduct, professing his readiness to appear to any action that might be brought; and from this time, down to 1819, the plaintiff went on regularly paying, without deducting or claiming to deduct out of the rent the tax in dispute, or renewing in any sort the objection of his non-liability to pay. The Court determined, upon a review of all the cases on the subject, that the plaintiff could not recover any of the sums so paid for *land-tax*.

4. OF MONEY PAID FOR ANOTHER UPON BILLS OF EXCHANGE, PROMISSORY NOTES, OR OTHER SECURITIES.

If A. accepts a bill of exchange merely for the accommodation of B. and when it becomes due an action is brought thereon by the holder against A., who defends it at the instance of B., and the holder recovers the full value and costs, which are afterwards paid by A., the latter may maintain an action of *indebitatus assumpsit* against B. for the amount thereof, as for so much money paid, laid out, and expended to his use. Thus, in the case of *Howes v. Martin*, (p) which was an action of *assumpsit* for money paid, laid out and expended by the plaintiff, to the use of the defendant. Upon the trial these facts appeared in evidence: the plaintiff and defendant having lived in habits of intimacy, the plaintiff had been induced, out of motives of friendship, and merely to accommodate the defendant, to accept several bills of exchange on his account. These bills had all been regularly taken up, as they became due, by the defendant, except the last, which was for 20*l.* This bill

(o) Brod. & Bing. 59. See also *Denby v. Moore*, 1 Barn. & Ald. 123. S. P. *Andrew and Hancock*, 1 Brod. & Bing. 37. 3 Moore, 279. S. P. Nor can the tenant plead such payments in bar in replevin to a distress for rent. *Stubbs v. Parsons*, 3 Barn. & Ald. 516.
(p) 1 Esp. Rep. 162.

had come into the hands of one *Greensill*, and the defendant being unable to take it up when due, had prevailed upon *Greensill* to accept 16*l.* in part, and the plaintiff's acceptance for six guineas, being the balance of the bill, with the interest then due for the remainder. This bill for six guineas not being paid when due, *Greensill* brought his action on it against *Howes*, the now plaintiff, as the acceptor. On the action being brought, the plaintiff acquainted *Martin* with the circumstance, and he desired the present plaintiff to defend the action, representing to her, that, as she had never received any consideration for the acceptance, she might safely do it. In consequence of which representation she did defend the action; but *Greensill* the plaintiff in that action, obtained a verdict against her for the amount of the bill, which, with the costs, amounted to 32*l.*; to recover which sum this action was brought: but the counsel for the defendant objected that this case came within the statute of frauds, 29 Car. 2. c. 3. the object of the action being to recover from the defendant a sum of money which was the debt and costs in an action against the plaintiff herself, on her own acceptance, and which, therefore, was to be deemed her own debt; but as there was no note in writing the action was not maintainable.

Lord *Kenyon* Ch. J. overruled this objection, and held that the case was not within the statute of frauds. His Lordship said, "that, in this case, it appeared that the plaintiff never had any consideration whatever for the acceptances, which were given merely on the defendant's account, and for his use; that the defence to the action on the note was on his account, and from whence he could have derived a benefit; that as he therefore was personally interested, and directed the defence to be made, by which he might have been benefited, that the money must be considered to have been laid out by the plaintiff on his account, and to his use; and that she therefore was entitled to recover it back from him."

So, where A. lent his acceptances to B. before his bankruptcy, but which were not paid till afterwards, A. may maintain an action against the defendant for *money paid to his use*, notwithstanding his bankruptcy and certificate, and notwithstanding the defendant, before his bankruptcy, gave his receipt to A. acknowledging the receipt of so much money as the acceptances amounted to. (q)

But, in the case of *Houle v. Baxter*, (r) which was also an action of *assumpsit* on promises; and the first count of the declaration stated that one *E. Capper* on the 22d of September, 1796, drew a bill of exchange upon the defendant for 25*l.*, payable at three months after date to *Capper's* order, which *Capper* indorsed to the plaintiff, and the defendant accepted. The second count, after setting out the bill and acceptance,

(q) *Snaith v. Gale*, 7 Term Rep. 364.
But see the stat. 49 Geo. 3. c. 121. s. 8.
and Chitty on Bills 580. 5 Ed.

(r) 5 East Rep.

and the indorsement by *Capper* to the plaintiff, further stated an indorsement and delivery of the bill to one *W. Abud*; a presentment of it, when due, to the defendant for payment, and his refusal; whereupon the plaintiff was obliged to pay *Abud* the money. There was also a count *for money paid*, &c. The defendant pleaded, that he became bankrupt on the 7th *November*, 1796. At the trial a verdict was found for the plaintiff, subject to the opinion of the Court of King's Bench on the following case: "The defendant, before his bankruptcy, kept a retail silversmith's shop, and dealt with *Capper*, the drawer of the bill, who was a working silversmith. On the 22d of *September*, 1796, the defendant ordered a parcel of goods of *Capper*, and in order to enable him to raise silver to make up such goods the defendant accepted the bill of exchange mentioned in the declaration: *Capper* indorsed the bill; and the plaintiff, at *Capper's* desire, though without the defendant's privity, indorsed it likewise, receiving no value or consideration whatever for so doing, but merely to give additional credit to the bill. The bill being thus drawn, accepted, and indorsed, *Capper* took it to one *Abud*, a refiner, who, on the credit of the bill, delivered to *Capper* a part of the amount in silver, and gave him the rest in cash. This silver was afterwards manufactured by *Capper* into the goods ordered by the defendant, which were accordingly delivered to him. The defendant became a bankrupt on the 7th of *November*, 1796, and afterwards obtained his certificate. On the 24th of *December*, 1796, being the day before the bill became due, the plaintiff went to *Abud*, and took it up, paying him the amount."

Grose J. delivered the opinion of the court as follows: "In this case the plaintiff contracted no liability at the defendant's request. He never became surety for him in this transaction. His demand against the defendant, the acceptor, arises solely upon the bill, and there was nothing to prevent his proving it under the commission. We are therefore of opinion, that the defendant's bankruptcy is a bar to this action, and consequently that there ought to be judgment for the defendant."

So, where A. and B., for their mutual accommodation, exchange acceptances for acceptances, or bills of exchange for bills of exchange, for equal sums, and both parties negotiate the bills; and after this transaction A. and B. both became bankrupts; and the estate of A. pays more upon B.'s acceptances than the estate of B. does upon A.'s acceptances; no action of *indebitatus assumpsit* will lie against B. upon an implied promise to pay the amount of the difference so paid by the assignees of A.; the remedy being upon the bills of exchange only, which were provable under the commission of B. (s)

(s) *Buckler v. Buttivant*, 3 East Rep. 72., and see *Cowley v. Dunlop*, 7 Term Rep. 665.

But where a bill is paid for the honour of the drawer, he is liable to an action of *indebitatus assumpsit* for money paid for the amount of the bill. This was settled in the case of *Smith* and another v. *Nissen* and another, (1) which was an action for money paid, laid out and expended. At the trial, before *Buller*, J. a verdict was found for the plaintiffs under the following circumstances: One *Taubert* sent an order to the defendants for goods, and desired that they would draw a bill on the plaintiffs for the value, which the defendants accordingly did after they had sent the goods. The plaintiffs, in a letter written to the defendants on the 23d *September*, said, that they could not accept the bill on account of *Taubert* at present, because they, (the defendants) had sent a larger quantity of goods than were ordered; adding, that they had written to *Taubert* for further directions. Two days afterwards the defendants wrote to the plaintiffs, pressing that the bill might be taken up; and on the 28th of the same month received for answer, that the plaintiffs had written to *Taubert*, and were waiting for his answer before they could accept; and that they had desired the holder to keep the bill in the mean time. On the 14th *October*, *Taubert*, in a letter to the plaintiffs, took notice that the orders had been exceeded, but desired that they would accept the bill, and draw upon *Govertz* at *Hamburg*, for the amount; in consequence of which the plaintiffs drew on *Govertz*, who refused to accept; and afterwards the plaintiffs paid the bill for the honour of the drawer; to recover back the amount of which the action was brought. A motion was afterwards made for a rule to show cause why the verdict should not be set aside, upon the ground that the plaintiffs had actually accepted the bill drawn upon them. The counsel for the defendant admitted that notwithstanding *Taubert's* letters, the plaintiffs might have chosen whether they would accept or not: but he contended, that they had only a right to draw on *Govertz*, upon condition that they themselves should accept the bill drawn upon them, and therefore that their drawing upon *Govertz* was an implied acceptance of that bill. But the court held, "that what the plaintiffs had done did not amount to an acceptance, for they never meant to make themselves liable, unless the bill, drawn upon *Govertz*, was accepted and paid; and they would not imply a contract which the parties themselves had refused to enter into."

5. OF MONEY PAID OR SECURITIES GIVEN BY A SURETY OR BAIL ON BEHALF OF THEIR PRINCIPAL.

Where money is paid by a surety in discharge of a bond entered into by him for his principal, he may recover against his principal the amount, by action of *indebitatus assumpsit* for money paid, upon an

(1) 1 Term Rep. 269.

implied promise to pay, &c. (u) So, a surety in a bond who pays the debt of his principal after a commission of bankruptcy issued against the latter, is not barred by the certificate of the principal, though the penalty of the bond was forfeited before. Thus, in the case of *Taylor v. Mills and Magnall*, (v) which was an action of *indebitatus assumpsit* for money paid, laid out, and expended by the plaintiff to the use of the defendants. The defendants, *Mills* and *Magnall*, were partners with one *Bailey*; and in order to raise money, the partner had entered into bonds. In the year 1765, *Bailey* withdrew from the partnership; and wishing to be discharged from these bonds, application was made to the plaintiff to become surety instead of *Bailey*. He did so. Upon which the former bonds were delivered to *Bailey* to be cancelled; the bonds became due; then the defendants became bankrupts. When the obligees had got as much money as they could from the partnership estate, and which amounted to no more than 6s. in the pound, they came upon the plaintiff for the residue. He accordingly paid it; and then brought his action for money paid, laid out and expended. At the trial, an objection was made that the bonds were not executed by *Magnall*; in answer to which an affidavit was produced by *Magnall*, in which he admitted he was liable as well as the rest, and would have executed the bonds if he had been in the country at the time. Upon this the jury found a verdict for the plaintiff. A motion, however, was afterwards made for a new trial, but the Court of King's Bench were clearly of opinion that the certificate was no bar to the action, and that the plaintiff was entitled to recover.

So, also the arrears of an annuity paid by a surety for the grantor after his bankruptcy, is not barred by his certificate. (w)

But if a surety, (who becomes bound in a bond with his principal for payment of money by instalments,) takes a bond from his principal, conditioned for payment of the amount of the instalments before the first of them will be due; and before that time the principal become bankrupt, and obtain his certificate; and afterwards the first bond be discharged by the surety, he cannot maintain an action of *assumpsit* against the principal for money paid to his use; his remedy being only upon the bond. (x)

Where a person becomes bail to an action he is entitled to recover from the principal in this form of action, all monies paid and expenses he has incurred in sending after the principal in order to take him, for the purpose of making a render; but he cannot recover the

(u) 2 Term Rep. 104. Esp. N.P. 96. (x) 2 Term Rep. 100. *Toussaint v. Martinant*, see also *Martin v. Court*.
(v) Cowp. 525. See also *Paul v. Jones*, 2 Term Rep. 640. *Hodgson v. Bell*,
1 Term Rep. 599. 7 Term Rep. 97. and *Ex parte Walker*,
(w) *Welsh v. Welsh*, 4 Maule & Sel. 4 Ves. 373.
333. *Flanagan v. Watkins*, 3 Barn. & Ald. 186., and 2 Barn. & Cres. 316.

costs of an action brought for the trouble, &c. of seeking after the principal. (y)

If a person gives a promissory note for the debt of another, which the creditor accepts in payment, it has been held, that this amounts to a payment of money to the party's use, and may be recovered as such. Thus, in the case of *Barclay and Proctor v. Gooch*, (z) which was an action of *assumpsit* brought to recover a sum of 50*l.* as so much money paid to the use of the defendant. The facts were these: The plaintiffs were brewers, and the defendant was a publican, who rented one of their houses, at which a benefit club was held; the members of the club distrusting the credit of *Gooch*, (the then landlord,) the plaintiffs became his security for the amount of the subscription money contained in the box; this amounted to 50*l.* *Gooch* afterwards became insolvent, and the club called upon the plaintiffs for the money as his security, and took their note of hand for it, payable with interest. The question was, whether this was a payment of money to the use of the defendant on which the plaintiffs could recover on the count for money paid? And upon which Lord *Kenyon* Ch. J. held, "That the club having consented to take the note from the plaintiffs, it was as payment to them of the money due by the defendant; it was payment of money to his use, and so the action was maintainable."

But in the case of *Taylor v. Higgins*, (a) where it appeared that the defendant being indebted to Mr. *Cresswell*, and being pressed for payment, he prevailed on the plaintiff, *Taylor*, to join with him in a bond to *Cresswell* for 150*l.* That in *August*, 1800, the plaintiff and the defendant being both arrested, and then in custody at the suit of *Cresswell*, in an action on the bond, the defendant paid the costs, and part of the debt, and, together with the plaintiff, executed to *Cresswell* a new warrant of attorney for 120*l.*, the remainder of the debt. In *December* following the defendant was arrested at the suit of *Cresswell*, and detained in custody; and in *July*, 1801, the present plaintiff and the defendant, being both then in custody, a declaration by way of detainer, was lodged against them by *Cresswell*; and on the 10th of *August* following the defendant took the benefit of an insolvent debtor's act, and was discharged under it. In *September*, 1802, the defendant was arrested, and holden to bail in this action by *Taylor* for 120*l.* on the affidavit to hold to bail before mentioned: whereupon application was made by the defendant to *Cresswell*, to know whether *Taylor* had paid him any money on account of the defendant, which was answered in the negative; but that after the defendant's discharge under the insolvent debtor's act, *Taylor* had given *Cresswell* a new bond and warrant of attorney for the

(y) *Fisher v. Fallows*, 5 Esp. Rep. 171. (a) 3 East Rep. 169. See also *Mar-*
(z) 2 Esp. Rep. 571. See also 3 Wills. *well v. Jameson*, 2 Bar. & Ald. 51, S. P.
14. Per curiam, S. P.

whole debt of 120*l.*, (for which this action was brought,) no part of which had yet been paid; but as appeared by the plaintiff's affidavit, he had at that time paid to *Cresswell* about 7*l.* or 8*l.* for costs: and he also swore, that when such new security was given it was accepted as payment and satisfaction of the whole debt; and the old bond and warrant of attorney were cancelled. Upon this case Lord *Ellenborough* Ch. J. (after consulting with the other judges of the court,) said: "There is no pretence for considering the giving this new security as so much money paid for the defendant's use. Supposing even the case of the note of hand or bill of exchange, as the current representative of money to have been rightly decided, still this security, consisting of a bond and warrant of attorney, is not the same as that, and is nothing like money."

6. OF CONTRIBUTION BETWEEN CO-SURETIES, OR OTHER PERSONS JOINTLY LIABLE FOR THE DEBT OF THEIR PRINCIPAL: AND FOR CONTRIBUTION AMONGST CO-DEFENDANTS FOR DAMAGES RECOVERED AGAINST THEM JOINTLY, EITHER FOR A TORT OR TRESPASS COMMITTED BY ALL OF THEM.

Where two or more persons become surety for another, and one of the sureties pays the debt of the principal, he may maintain an action of *indebitatus assumpsit* for money paid against each of the co-sureties either upon an express or implied promise to pay his aliquot proportion of the money so paid, regard being had to the number of sureties. Thus, if S. and B. are bound in an obligation to J. S. to pay a certain debt for J. D., and the obligation being forfeited, B. says to S., that if he will pay all the principal to J. S. he promises to repay him one moiety, and thereupon S. pays all accordingly to J. S., S. may have an action upon the case upon this promise against B., if he will not pay him the moiety; for though he might have been charged for the whole debt by the obligee, yet the payment thereof without suit, and in discharge of B., is a good consideration to maintain the action. (b)

So, in the case of *Cowell v. Edwards*, (c) which was an action of *indebitatus assumpsit* for money paid by the plaintiff, as administrator, under the following circumstances: "John Cowell, the plaintiff's intestate, having entered into a joint and several bond with seven other persons, two of whom were principals, and the five others, as well as himself, sureties, was, together with his co-sureties, called upon by the obligees to pay the sum engaged for; the defendant, and two of the other sureties paid each a part of that sum, but the present plaintiff's intestate paid the residue. Upon this the plaintiff, considering the de-

(b) *Bagg v. Slade*, 1 Rol. Abr. 20. pl. 16. (c) 2 Bos. & Pul. 268. See also *Deering v. Lord Winchelsea*, ib. 270. S. P. 354. 3 Bulst. 162. Jenk. 324. v. Lord Winchelsea, ib. 270. S. P. pl. 27.

fendant, and one of the two sureties, who had already contributed as the only solvent sureties, called upon them to pay their proportion, and brought this action to recover from the defendant such a sum of money, as when added to what had been already paid by him would make up one-third of the whole sum paid to the obligees, deducting only what had been contributed by the fourth surety not called upon at the time." On behalf of the defendant, the following objections were taken, viz. that this action could not be maintained at law by one co-surety against another; that if the action could be maintained for one-sixth of the whole sum engaged for, and which, under the circumstances of the present case, he insisted was all that could be recovered from the defendant, yet, that the insolvency of the two principals, and of the three other co-sureties, should have been proved in order to entitle the plaintiff to the present verdict. The Court observed, "that it might now, perhaps, be found too late to hold that this action could not be maintained at law, though neither the insolvency of the principals, or of any of the co-sureties were proved; but that at all events the plaintiff could not be entitled to recover at law more than one-sixth of the whole sum paid. And Lord Eldon Ch. J. said, "that he had conversed with Lord Kenyon upon the subject, who was also of opinion, that no more than an aliquot part of the whole, regard being had to the number of co-sureties, could be recovered at law by the defendant; though if the insolvency of all the other parties were made out, a larger proportion might be recovered in a court of equity."

So, where three persons are jointly liable to pay a debt, and two of them pay it, they cannot maintain a joint action against the third to recover his aliquot proportion; but each must bring a separate action for his aliquot share of the money so paid. Thus, in the case of *Brand and Herbert v. Boulcott*, (d) which was also an action of *indebitatus assumpsit* for money paid. The facts were these: "The plaintiffs sued out a commission of bankrupt against T. L. as joint petitioning creditors, and were chosen assignees under that commission, together with the defendant; and both the plaintiffs and the defendant acted as assignees under the commission. Each of the plaintiffs paid to the solicitor, under the commission, the sum of 104*l.* in discharge of his bill for expences incurred on account of the bankruptcy; and the present action was brought to recover the defendant's proportion of the 208*l.* paid by the plaintiffs." The Court determined that the plaintiffs could not maintain a joint action, but that separate actions ought to have been brought by each of them for contribution against the defendant.

However, where A. was engaged as a partner in a particular transaction with B. C. and D. who were before partners, after which B. C.

(d) 5 Bos. & Pul. 435. See also *Graham and others v. Robertson*, 2 T. R. 282. and *Kelby and another v. Steel*, 5 Esp. Rep. 194. S. F.

and D. became bankrupts; and, after their bankruptcy, A. paid a debt due from himself and them to a joint creditor; it was decided, that these three partners constituted but one debtor to A., and that he might recover from B. the proportion of B. C. and D. towards the joint debt, B. not having pleaded in abatement. (e)

If A. at the instance of B. become a co-surety with him for the debt of C.; and B. is forced to pay the whole debt, he cannot recover a moiety thereof from A. This point was settled in the case of *Turner v. Davies*, (f) which was an action of *indebitatus assumpsit* for money paid, under the following circumstances: There was an execution in the house of one *Evans*, at the suit of *Brough*, for 23*l.*; but to induce *Brough* to withdraw it, and to secure the debt, *Turner*, the plaintiff, and *Davies*, the defendant, joined in a warrant of attorney to *Brough*; but *Davies* had joined in consequence of having been applied to by *Turner* and *Brough*, who required an additional security. *Turner*, the plaintiff, took a bill of sale from *Evans* for his own security, dated 20th *January*, 1796; and an indorsement was made on it, declaring the purpose for which it was given. Another execution having issued against *Evans*, the goods were taken in execution, and *Turner*, the plaintiff, had paid the whole of *Brough's* demand, and afterwards brought this action against the defendant for contribution of the moiety. But the Court determined that such action would not lie. And Lord *Kenyon* Ch. J. said, "I have no doubt that where two parties become joint sureties for a third person, if one is called upon and forced to pay the whole of the money, he has a right to call on his co-security for contribution: but where one has been induced so to become surety at the instance of the other, though he thereby renders himself liable to the person to whom the security is given, there is no pretence for saying that he shall be liable to be called upon by the person at whose request he entered into the security. This is the case here: *Davies*, the defendant, became security, at the instance of *Turner*, the plaintiff, to *Brough*; and there is still less pretext for *Turner* to call on the defendants in this action, as he took the precaution to secure himself by bill of sale."

Where one joint contractor pays money for another under an equitable claim, he may recover it from the other as money paid to his use. And a covenant not to sue one of two joint debtors does not operate as a release to the other. (g) But where A. recovers damages in an action of tort against two defendants, and levy the whole damages on one, that one cannot recover a moiety thereof against his co-defendant for his contribution. Thus, in the case of *Merryweather v. Nixon*, (h) where it appeared, that one *Starkey* brought an action on the case against the

(e) Vide *Wright v. Hunter*, 1 East Rep. 30. (g) *Hutton v. Eyre*, 6 Taunt. 289.
(f) 2 Esp. Rep. 478. (h) 8 Term Rep. 186.

present plaintiff and defendant, for an injury done by them to his reversionary estate in a mill, in which was included a count in *trover* for the machinery belonging to the mill; and having recovered 840*l.* he levied the whole on the present plaintiff, who thereupon brought this action against the defendant for a contribution of a moiety, as for so much money paid to his use. But the Court of King's Bench determined, that no contribution could by law be claimed as between *joint wrong-doers*; and consequently this action, upon an *implied assumpsit*, could not be maintained on the mere ground that the plaintiff had alone paid the money which had been recovered against him and the other defendant in that action. And Lord *Kenyon* Ch. J. said, "That he never heard of such an action having been brought, where the former recovery was for a *tort*; that the distinction was clear between this case and that of a joint judgment against several defendants, in an action of *assumpsit*; and that this decision would not affect cases of indemnity, where one man employed another to do acts, not unlawful in themselves, for the purpose of asserting a right." And the same point has also been determined where an action of trespass *vi et armis* was brought against several co-trespassers. (i)

So, where two persons agree to buy stock and tickets for time, on speculation, upon their joint account, and being losers, one of them (without the knowledge of the other) pays all the money, he cannot maintain an action for contribution against his companion, the transaction being illegal. (k)

But it has been since determined, that if two persons jointly engage in a stock-jobbing transaction, and incur losses, and employ a broker to pay the differences, and one of them repay the broker, with the privity and consent of the other, the whole sum, he may recover a moiety from that other, in an action for money paid to his use, notwithstanding the transaction be illegal, and contrary to the statute 7 Geo. 2. c. 8. (l)

If a party dine at a tavern, and one of them pays the reckoning for himself and the rest of the company, he may recover from the others their aliquot proportions, by separate actions against each. (m)

7. OF CONTRIBUTION BY THE OWNERS OF ADJOINING PROPERTY TOWARDS THE EXPENCES OF BUILDING PARTY-WALLS.

By the stat. 14 Geo. 3. c. 78. s. 41. it is enacted, "That the person or persons at whose expence any party-wall, or party-arch shall be built,

(i) *Farebrother v. Ansley*, 1 Campb. 343.

(k) *Thwaite v. Warner*, Lond. Sitt. Trin. 1773. Esp. N.P. 88.

(l) *Petrie and another v. Hannay*, 3 Term Rep. 418. But see *Steers v.*

Lashley, 6 Term Rep. 61., and *Cannon v. Bryce*, 3 Barn. & Ald. 179. *contra*. Note also, in this last case all former cases on the subject are cited.

(m) Per Lord *Kenyon*, 8 Term Rep. 614. 1 Rel. Abr. 24. pl. 51.

agreeably to the directions of this act, shall be reimbursed by the owner, or owners, who shall be entitled to the improved rent of the adjoining building, or ground, and who shall, at any time, make use of such party-wall, or party-arch, a part of the expence of building the same, in the proportion after mentioned; that is to say, if the adjoining building then erected, or afterwards to be erected, be of the same rate or class of buildings as, or superior to, the building belonging to the person or persons at whose expence the said party-wall was built, then the owner or occupier of such adjoining building, or ground, shall pay one moiety of the expence of building so much of the said party-wall, or party-arch, as such owner or occupier shall make use of; and if the adjoining building then erected, or afterwards to be erected, be of an inferior rate or class of building, then the owner or occupier of such adjoining building, or ground, shall pay a sum of money, equal to one moiety of the expence of building a party-wall, or party-arch, of the thickness by this act required for the rate or class of building whereof such adjoining building shall be, and of the height and breadth of so much of the said party-wall, or party-arch, as such owner or occupier shall make use of: and in the mean time, and until such moiety or other proportional part of the expence of building such party-wall, or party-arch, be so paid, the sole property of such whole party-wall, or party-arch, and of the whole ground whereon the said party-wall shall stand, shall be vested entirely in the person, or persons, at whose expence the same shall be built: and such moiety, or other proportional part of the expence of building such party-wall, or party-arch, shall be so paid to the person or persons at whose expence the same shall be built, or in whom the property thereof shall be vested, at the times hereinafter mentioned; that is to say, in respect of every such party-wall to any house, or building, whereunto, at the time of building the same, no other house or building was adjoining, so soon as such party-wall shall be first cut into or made use of; and in respect of every such party-wall, or party-arch, as shall be built against, or adjoining to any other house or building, so soon as such party-wall or party-arch shall be completely built and finished; and in respect of such last mentioned party-wall, or party-arch, the owner or occupier of such adjoining house, or building, shall, together with such proportional part of the expence of building such party-wall, or party-arch, also pay a like proportional part of all other expences which shall be necessary to the pulling down the old party-wall, or timber or wood partition, and the whole of all the reasonable expences of shoring up such adjoining house, or building, and of removing any goods, furniture, or other things, and of pulling down any wainscot or partition, and also all such costs, if any, as may have been awarded by the said court of mayor and aldermen, or court of sessions as aforesaid, but not any part of the expence of pulling down and clearing away any

such old party-wall, or party-arch, or old partition, if any such there was. And it is hereby directed, that the expence of building such party-wall, or party-arch, shall be estimated after the rate of 7*l.* 15*s.* by the rod, for the new brick work, deducting thereout after the rate of 1*l.* 8*s.* by the rod for the materials, (if any) of so much of the old wall, or arch, as did belong to such adjoining building, or ground; and also after the rate of 2*l.* by the cubical foot for the materials, (if any) of so much of the old timber partition as did belong to such adjoining building, or ground; and that, within ten days after such party-wall, or party-arch shall be so built, or so soon after as conveniently may be, such first builder, or builders, shall leave, at such adjoining house or building, a true account, in writing, of the number of rods in such party-wall, or party-arch, for which the owner or owners of such adjoining building, or ground, shall be liable to pay, and of the deduction which such owner or owners shall be entitled to make thereout, on account of such materials, and also an account of such other expences and costs as aforesaid; whereupon it shall be lawful for the tenant or occupier of such adjoining building, or ground, to pay one moiety, or such proportional part as aforesaid, to such first builder, or builders, for the same, and also for shoring and supporting such adjoining building as aforesaid, and for all such other expences as are hereinbefore directed to be paid by the owner or owners of such adjoining building, or ground, and to deduct the same out of the rent which shall become due from him, or her, to such owner or owners, under whom he or she holds the same respectively, until he or she shall be reimbursed the same: and in case the same be not paid within twenty-one days next after demand thereof, then the same shall and may be recovered, together with full costs of suit, of and from such owner or owners, by action of debt, or on the case, in any of his Majesty's courts of record, at *Westminster*, wherein no essoin, protection, or wager of law, or more than one imparlance shall be allowed. And if the plaintiff, or plaintiffs, in any such action shall, three calendar months, at the least, before the commencement thereof, give notice, in writing, to the person or persons against whom such action is intended to be brought, of his, her, or their intention to bring the same, or leave the same at his, her, or their last or usual place of abode, and shall, in such notice, specify the sum for which it is to be brought, and also annex to such notice a bill of the just and true particulars of the expences and charges with which the intended defendant or defendants, is or are to be charged, then such plaintiff or plaintiffs if he, she, or they recover the full sum specified in such notice, *shall also recover and be entitled to double costs of suit*, and shall have and be entitled to the like remedies for recovery thereof as are usually given for costs in other cases of costs at law."

And by section 42. it is further enacted, by the authority aforesaid,

"that every party-wall hereafter to be built, and every addition which shall be made thereto, or to any party-wall which is already built or begun, shall be built agreeable to the directions herein contained, concerning the party-wall of the highest rate or class of building to which such party-wall shall adjoin, when such additions are completed; and that no party-wall now built, or hereafter to be built, shall, after the same, and the buildings adjoining thereto, is and are completed, be raised, unless the same, when raised, be of the full thickness such party-wall is of in the story next under the roof of the highest adjoining building; nor shall any party-wall hereafter be raised, unless the same can be done with safety to such wall, and the several buildings adjoining thereto: but all such party-walls as will, when raised, be of the materials, heights, and thicknesses hereinbefore required, or as can be safely raised, may, together with the shaft or shafts of the chimneys belonging thereto, be raised by and at the expence of the proprietor or occupier of any building to which the same belong, to any height, he, she, or they shall think proper. But if the proprietor or occupier of any building adjoining to the said party-wall and chimney shafts shall make use of any part of such party-wall and chimney-shafts, other than the use he makes of the chimney flues therein, which shall be so raised, then such person so making use thereof, for the part so used, shall be chargeable with a proportionable share of the expence of raising such party-wall and chimney shafts; and, in computing such charge, the same shall be rated in manner hereinbefore mentioned, and the proportion such person shall be liable to pay shall be recovered in such manner as is hereinbefore particularly declared concerning the first building of a party-wall."

Upon this act of parliament the owner of the improved rent is alone liable to contribute a moiety of the expence of building a party-wall: and he may be sued by action of *indebitatus assumpsit* for money paid, if the wall is immediately used by the owner of the adjoining house; but where no building adjoins at the time of erecting the party-wall, the declaration should not be in the common form, namely for money paid generally, but it should state all the circumstances specially. (m) As doubts are frequently raised upon the question, who is to be deemed the owner of the improved rent, and liable to contribute? it may here be useful to present the reader with the different determinations to be met with in the reports upon this point. The first of them is *Southall v. Leadbetter*, (n) which was an action of *replevin*; and the defendant avowed as bailiff of *J. Winter*, for 30*l.* for a quarter's rent of a house in *Shugg Lane*. At the trial, before *Lord Kenyon*, Ch. J. the jury found a verdict for the plaintiff, subject to the opinion of the Court of

(m) Vide 5 Term Rep. 130. 8 Term (n) 3 Term Rep. 458.
Rep. 602.

King's Bench, on the following case, in order to try the single question whether *Lygow*, the assignee of the lease of the house, for which the rent was claimed to be due, or *Winter*, was to pay the moiety of the expence of rebuilding a party-wall between that house and an adjoining one. " *Winter* was the landlord of the premises in question, and was seised in fee thereof. *Lygow* was occupier of part of the premises, and was assignee of a lease thereof granted by *Winter* to one *Foulston*, deceased, for twenty-one years, dated 3d July, 1786; by which lease, (reciting an agreement, in writing, dated the 14th October, 1784, between *Winter* and *Foulston*, that the latter should repair the messuage and premises therein mentioned, according to the particulars ascertained by a surveyor, and that he would, on or before the 24th June, 1785, at his own cost and charge, put the said messuages, &c. into good and sufficient repair; on finishing which, *Winter* would make a lease thereof to *Foulston*, to commence from Midsummer-day then last, for twenty-one years, under the rent of a pepper corn for the first half year of the term, and under the clear yearly rent of 120*l.* for the remainder of the term; and also reciting that *Foulston*, in pursuance of that agreement, had repaired, &c.) *Winter* demised the premises to *Foulston*, his executors, administrators, and assigns, according to that agreement. The lease also contained a covenant by *Foulston* to pay, " from time to time, and at all times during the term, the land-tax and all other taxes, rates, assessments, and impositions whatever, already laid, assessed, or imposed upon the said premises, or on any part thereof, or upon the said *John Winter*, his heirs and assigns, in respect thereof, by authority of Parliament, or otherwise howsoever." The case then stated that *Foulston* laid out and expended, in the repairs of the premises, 150*l.*; and that, though the consideration stated in the assignment to *Lygow* appears to be only 5*s.* yet that the sum actually paid as the consideration for it was 160*l.* The old wall was condemned in the year 1788; and the present party-wall was built according to the terms of the act of Parliament. *Lygow* has paid for a moiety of the party-wall, the bills for which exceed the quarter's rent for which the distress was made: those bills were tendered to *Winter* before the distress, but he refused to allow them. The premises in question were, previous to the commencement of the present lease, let by *Winter*, at the rent 110*l. per annum*, out of which he allowed to the tenant the land-tax."

The Court determined, that *Winter* was the person liable under the act to pay the moiety of the expence of rebuilding the party-wall. And Lord *Kenyon*, Ch. J. said, " The improved rent mentioned in this Act of Parliament stands contradistinguished from some other rent; but here no other rent was reserved but that at the granting of the lease. But it is said that the lessee received from his assignee a sum in gross, as the consideration for the purchase, which is equivalent to an

improved rent. If, indeed, a large sum were paid for the purchase of a lease, though no improved rent were reserved to the original lessee, I think he would be liable to pay this expence within the Act of Parliament. But that is not the present case: for when *Winter* granted this lease he reserved the best rent which could be procured for it at the time, since this rent exceeds the rent formerly reserved by 10*l. per annum*, and the whole of the land-tax; and the case ought not to be varied by the circumstance of the estate's gradually increasing in a small degree. Where the parties contract for a lease at rack rent, the landlord is the person who ought to bear the expence of the party-wall. Then it was contended that the full rent was not reserved originally, because it was stipulated that the tenant should lay out a considerable sum of money in improving the estate: but it must also be remembered, that in consideration of that, the lessee was to pay no rent for the first half year; which might have been considered at the time as commensurate with the sum to be laid out in the repairs. Neither is the lessee concluded by the covenant to pay the taxes, assessments, impositions, &c. for that only extends to the land-tax, and all other taxes *ejusdem generis*: but this is not a tax."

The owner of the improved rent, and not of the ground rent, is the party liable by the Act of Parliament: thus, in the case of *Peck v. Wood*, (o) which was an action of *assumpsit* to recover 42*l.* for half of the expence of a party-wall, between the plaintiff's and defendant's house, built by the former, under the stat. 14 Geo. III. c. 78. s. 41. On the trial, a special case was reserved for the opinion of the Court of King's Bench, which stated, in substance, as follows: "On the 18th November, 1788, the defendant entered into an agreement with *W. Pateman*, for a building lease of a piece of ground adjoining to the plaintiff's house in *Princes-street, Westminster*, whereon was standing a messuage and other buildings, for sixty-one years, to commence from the 29th of September then last, at the yearly rent of 8*l.* free from all deductions whatsoever, whether parliamentary or parochial, then or thereafter to be imposed or assessed, either on the landlord or tenant; and it was agreed that the defendant should immediately proceed to pull down the premises, and erect thereon at least one good substantial brick dwelling-house, with necessary convenient out-houses and offices, &c. and to lay out and expend in the erection of such new building 300*l.* at least. Pursuant to this agreement, a lease of the premises was granted and executed, in January, 1789, by *Pateman* to the defendant. The plaintiff, previous to the defendant's entering into the agreement with *Pateman* for the lease, had pulled down the old wall, which was standing between his (the plaintiff's) house, and the house and premises which the defendant took upon lease as aforesaid. On the 29th Sep-

(o) 5 Term Rep. 130.

tember, 1788, the party-wall was begun to be built; and on the 17th day of *January* following it was finished. In *June*, 1790, the defendant let the house held of *Pateman* to *J. Beach*, at the yearly rent of 31*l.* 10*s.* the land-tax and sewer's tax deducted. It was absolutely necessary that the old wall should be pulled down. The defendant enjoys the improved rent; and *Pateman* is still the ground landlord. The plaintiff did not give three months' notice in writing to *Pateman*, the then owner and ground landlord of the house and premises, which were afterwards leased to the defendant, prior to his pulling down the party-wall; but he applied to *Pateman* for that purpose, who agreed that it should be pulled down, if *Hawkins*, the then tenant, would consent; and *Hawkins* did consent. The new party-wall is built agreeably to the directions of the statute 14 Geo. III. c. 78. The defendant has the benefit of the party-wall, and that in a greater degree than the plaintiff; his house extending farther back than the plaintiff's. The Court were of opinion that the defendant, being owner of the improved rent, was liable to pay the expences of the party-wall; and that the defendant was not entitled to the three months' notice required by section 38. of the act: and *Buller*, J. said, "The three months required by section 38. is only necessary in those instances where the party is either ignorant of, or adverse to, the building of the wall: but this was begun with *Pateman's* consent, and before its completion the possession of the house was changed. The defendant, therefore, was not entitled to notice, he standing in *Pateman's* place. And with regard to the principal question, it would be unjust that *Pateman*, who receives a ground rent of 8*l.* only, and who derives no advantage from the party-wall, should pay the expence of it; and that the defendant, who does enjoy it, and who is in the receipt of an improved rent of 31*l.* should not contribute any part of this expence."

But the accounts must be delivered and demand made within 21 days, before any action is brought as directed by the 41st section of the Act. (p) So, notwithstanding the lessee or assignee has improved the house demised, the lessor of the premises at rack rent is the person to be deemed the owner of the improved rent, and liable to contribute, and not the lessee, unless the latter under-lets the house at an improved rent. (q)

But where the lessee covenanted to pay a reasonable share and proportion of the expences for repairing party-walls, &c., it has been determined, that he, and not the lessor is liable. Thus, in the case of *Barrett v. the Duke of Bedford* (r) which was also an action of *assumpsit*

(p) Vide *Philp v. Donati*, 2 Taunt 62.

(q) *Beardmore v. Fox*, 8 Term Rep. 214. *Lambe v. Hemans*, 3 Barn. and

Ald. 467., and see *Saugater v. Birkhead*, 1 Bos. & Pul. 305.

(r) 8 Term Rep. 602.

to recover 195*l.* paid by the plaintiff for the proportionate part of the expences of a party-wall, built by the proprietor of the adjoining house, under the stat. 14 Geo. III. c. 78. s. 41. A verdict was taken for the plaintiff for that sum, subject to the opinion of the Court of King's Bench on the following case: In the year 1786 the plaintiff, by assignment, became possessed of a lease, granted in the year 1762, by the defendant's grandfather, of certain premises on the north side of the *Great Piazza, Covent Garden*, for a term of thirty years, of which about six years were then unexpired, under a yearly rent of 60*l.* On the 6th of *October*, 1788, a new lease was granted by the defendant to the plaintiff, for a term of thirty-one years, to commence at the expiration of the said lease, or *Lady-day*, 1792, at 60*l. per annum*. The last mentioned lease is stated to be granted in consideration of the great expence and charges which the plaintiff had been at in repairing the premises, and also in consideration of the following, among other covenants: "And likewise that the said *Michael Barrett*, his executors, administrators, and assigns, shall and will, from time to time, and at all times during the continuance of the said term hereby granted, bear, pay, and discharge all taxes, rates, duties, assessments, and impositions of what nature or kind soever, and whether parliamentary or parochial, imposed or charged, or which, at any time during the term hereby granted, shall be imposed or charged on the hereby demised premises, or any part thereof, or upon the landlord for the time being in respect thereof, or of the said rent reserved for the same; it being the true intent and meaning of these presents, and of the parties hereto, that that the said Duke of *Bedford*, his heirs and assigns, shall have and receive the said yearly rent or sum of 60*l.* hereby reserved in net money, without any deduction, defalcation, or allowance out of the same, on any account whatsoever; and that he, the said *Michael Barrett*, his executors, administrators, and assigns shall and will, during the term hereby granted, as often as need shall require, bear, pay, and allow a reasonable share and proportion of, or for and towards supporting, repairing, amending, and cleansing all party-walls, party-gutters, common sewers, public sewers, and drains belonging, or which, at any time during the said term hereby granted shall belong to the said hereby demised premises, or any part thereof." These covenants were *verbatim* as in the old lease, with the exception of such parts as relate to the payment of the land-tax by the tenant, which by the former lease was paid by the landlord, and the amount of which was 22*l.* 10*s. per annum*. The demised premises consist of two shops on the ground floor, and a range of apartments above stairs. Before the pulling down and building of the party-wall hereinafter mentioned, one of the shops was under-let by the plaintiff by lease for seven, fourteen, or twenty-one years, at the yearly rent of 60*l.*, the plaintiff covenanting

to pay all the taxes, and for water. And the other of the shops was under-let by the plaintiff by lease to one *J. Aldrich* for twenty-one years, at the rent of 26*l.* 5*s.*, the plaintiff covenanting to pay all the taxes. The residue of the demised apartments was kept by the plaintiff for several years in his own hands, but at the time when the party-wall was built, he had let them furnished to one *Searle* for twenty-one years, at the yearly rent of 210*l.*, the plaintiff covenanting to pay all the taxes. At the time the party-wall was built, the taxes, paid by the plaintiff, amounted to 72*l.* 3*s.* a year. The court determined that the tenant, (not the landlord,) was bound to pay the moiety of the expence of the party-wall. And Lord *Kenyon*, Ch. J. said: "If there were no covenants in the lease applicable to this subject, there would be great weight in the plaintiff's argument: but it is not necessary to consider which of these parties would have been liable under the act of parliament; *modus et conventio vincunt legem*. I think it was the intention of the parties to this lease, that the expence of the party-wall should be borne by the tenant. Had there been nothing more in the lease than the tenant's covenant to pay 'taxes, rates, duties, assessments and impositions, whether parliamentary or parochial,' I should have entertained the same opinion in this case that I expressed in one of the cases cited, that those words did not extend to building a party-wall: but the latter part of that covenant by which the tenant covenanted that the landlord should receive the 'yearly sum of 60*l.* in net money, without any deduction or allowance out of the same,' and the covenant respecting the 'repairing of all party-walls,' &c. satisfy me that the parties intended that this expence should fall on the tenant."

So, in the case of *Stewart v. Smith*, (s) which was an action brought to recover 28*l.* the moiety of the expence of erecting a party wall between the plaintiff's house and a house occupied by the defendant. And it appeared that the old party wall being out of repair, it became necessary to rebuild it, that the plaintiff applied to the defendant, who enquired what the expence would be, and upon being told his proportion, said, "Very well; I shall expect to pay what is right and fair." About six weeks after wall was rebuilt, the plaintiff called on the defendant for 10*l.* in part payment, the defendant said, it was not convenient for him to pay. It also appeared that the defendant paid rent to two persons, viz. 32*l.* to one, and 18*l.* to another: the wall was rebuilt in *September*, 1815. Since the action was brought, the defendant had offered his lease for sale, for 300*l.* It was admitted that no notice of accounts, as directed by the act (14 Geo. 3. c. 78. s. 41.) had been delivered to the defendant, or left at his house. For the defendant two objections were taken, first, that the 41st section of the building act, throws the burthen of rebuilding

(s) Holt N.P. Cas. 521. 2 Mar. 435. 7 Taunt. 158. S.C.

and repairing party walls upon the *owners of the improved rent*. There was no evidence that defendant was such owner. The fact of his having offered his lease for sale long after the wall was rebuilt, did not prove his original liability. Had he even sold his lease for a premium, it would not make him liable as owner of an improved rent, for it was in evidence that he paid rent to two distinct persons, one or other of which rents, in the absence of evidence, might be presumed to be an improved rent. 2d. His promise to pay must be construed with reference to his legal liability. If the obligation to repair, be in another person, such promise not being in writing was void by the statute of frauds. But the effect of the word is not a general promise, nor does it dispense with the provisions of the building act. "I shall pay what is right and fair;" this is no dispensation of the means prescribed by the statute for ascertaining what is "right and fair." But *Gibbs* Ch. J. said, "the act requires certain forms which must be complied with against an adverse occupier. But neither the act of parliament, nor the forms are very clear and precise. I agree that the owner of the improved rent is alone liable. But there are two questions in this case: 1st, Have not the parties come to an understanding to dispense with the formalities of the building act, which they may do; 2d, Has not the defendant made himself liable by his promise? He desired to know what the expence would be, and agreed to pay his moiety. He assumes the responsibility upon himself, and as occupier there is sufficient consideration for him to make such agreement, supposing him not to be the owner of the improved rent, though there is a strong presumption that he is such owner. The construction of the evidence will be for the jury, but I think the plaintiff entitled to recover." And the jury accordingly found a verdict for the plaintiff.

Upon the 38th section of the building act, respecting a contribution towards shoring up a house, &c. it was determined, in the case of *Robinson v. Lewis*, (t) that where notice of pulling down and re-building a party-wall, was given under the building act 14 Geo. 3. c. 78. and the tenant of the adjoining house, who was under covenant to repair, finding it necessary in consequence, to shore up his house, and to pull down and replace the wainscot and partitions of it, instead of leaving such expences to be incurred, and paid by the owner of the house, giving notice, in the manner prescribed by the act, and afterwards paying the same to him upon demand, employed workmen of his own to do those necessary works, and paid them for the same, that he could not recover over against his landlord such expences incurred by his own orders, and paid for by him in the first instance: for all the powers and authorities given by the act in respect to any works to be done, are

(t) 2 Esp. Rep. 227.

given to the owner of the house intended to be pulled down and rebuilt, and the landlord of the adjoining house being only liable by the act to reimburse his tenant, money paid by him to the other owner for such works as are authorised to be done by such other owner in respect of such adjoining house. And Lord *Ellenborough*, in delivering the judgment of the Court upon this case, said, "The money sought to be recovered in this action is the expence of shoring up the plaintiff's house, which work was done by a workman employed by the plaintiff for that purpose, and the money paid by the plaintiff to such workman. This is an expence which properly belonged to the plaintiff, except so far as the statute 14 Geo. 3. c. 78. has shifted the burthen; because the plaintiff was tenant under covenant by the terms of his lease to repair, uphold, and support the demised premises; and the defendant, the landlord, is no further or otherwise liable to this expence than as the act of parliament has made him so, the rule and manner of his liability must therefore be found in the act. Now the act empowers the person at whose expence a party-wall is rebuilt, in other words, the owner of the house adjoined to his, pursuing the directions, and giving the notices pointed out therein, to shore up the house, and build the party-wall, and after the expence has been ascertained by surveyors in the manner pointed out by the act, to leave a true account in writing at the adjoining house, whereupon the act directs, that it shall be lawful for the tenant or occupier of the adjoining building or ground to pay one third, or such proportional part of building the wall as aforesaid, and also for shoring and supporting such adjoining building, and such other expences as are directed to be paid by the owner, and to deduct the same out of the rent which shall become due from him to such owner under whom he holds the same, until he shall be reimbursed, and in case the same be not be paid within 21 days next after demand thereof, then that the same may be recovered with full costs of suit of such owner, by action of debt, or on the case. All the powers and authorities given by this act, in respect to any works to be done, are given to the owner of the house intended to be pulled down and rebuilt, and the money is to be paid by him; and it is only in the event of the money for doing such works having been paid to him by the tenant, that such tenant can reimburse himself as against his landlord. This being, therefore, an expence incurred by the tenant by his own act, and not in pursuance of the provisions of the statute, cannot be recovered against the defendant his landlord."

8. OF A COMPULSORY PAYMENT OF THE DEBT &c. OF ANOTHER, MADE EITHER BY AN ATTORNEY, SHERIFF, GAOLER OR OTHERS.

Where an annuity has been vacated by reason of a defect in the memorial, and the attorney who prepared the conveyances is sued by the grantee for negligence, and a verdict recovered against him to the amount of the consideration-money paid for the annuity, which he pays, he cannot recover it over against the grantor. Thus, in the case of *Burdon v. Webb*, (u) which was an action of *assumpsit* for money paid. The facts were these: *Webb* had granted an annuity to A. B., and *Burden* was the attorney for the grantee. A memorial of this annuity not having been properly registered, on application to the court it had been set aside, and the grantee being at that time dead, his executors brought an action against *Webb* for money had and received, being the consideration paid to him for the annuity, and had a verdict against him; *Webb* being then in distressed circumstances, and not paying the money recovered against him, the executors brought an action against *Burden* for negligence: before the trial, he gave a cognovit for the amount of the consideration money paid for the annuity, and afterwards paid it; and this action was brought against *Webb* for the money so paid. But Lord *Kenyon*, Ch. J. said, "It cannot be supported, that a party by his own act, and without the consent of another, by paying money for him, can maintain an action on it; if it was so, it would be of the worst consequences, as by that means a man might get his greatest enemy for his creditor: if a surety pays money for his principal, as such was paid by reason of the security, he may maintain an action for it against his principal. I have often ruled that point; but in the present instance the case is very different, the money has been paid by the attorney for his own negligence, and this being in consequence of an action brought against himself, it will not entitle him to maintain an action against the defendant." The plaintiff must be nonsuited.

So, where a sheriff or gaoler voluntarily suffers a prisoner to escape, and in consequence thereof is obliged to pay the amount of the debt for which the prisoner was committed to prison, he cannot maintain an action against such prisoner for the money so paid. Thus, in the case of *Eyles v. Faikney*, (v) where it appeared, that the defendant being a prisoner in the custody of the plaintiff (who was a warden of the *Fleet Prison*) on mesne process, at the suit of one *Holland*, a written authority came from *Holland* to the plaintiff to discharge the defendant out of his custody, but *Molloy*, the plaintiff's deputy, having doubts as to the

(u) 2 Esp. Rep. 527.

Peake's Cas. N. P. 144. n. a. See also

(v) K. B. East Term. 32 Geo. III. *Pitcher v. Bailey*, 5 East Rep. 171. S. P.

authenticity of the discharge, applied to *Holland*, to know whether it was his hand-writing. *Holland* confessed he had signed the paper, but said, that he had been imposed on by the defendant, and therefore countermanded the authority. The defendant insisted that the authority to discharge him was irrevocable, and threatened *Molloy* with an action if he detained him; and *Molloy* thinking that *Holland* could not revoke his order, discharged the defendant out of his custody. *Holland* afterwards brought an action in the Common Pleas against the plaintiff for an escape, and recovered a verdict and 300*l.* damages, to recover which money the present action was brought, as for money paid, laid out and expended. The cause was tried before Lord *Kenyon*, Ch. J. at *Westminster*; but his lordship being of opinion, that the plaintiff had been guilty of a breach of his duty in permitting this defendant to escape, ruled that he ought not to be permitted to come as a plaintiff into a court of justice; and therefore ordered a nonsuit. His lordship's opinion was afterwards confirmed by the Court of King's Bench, upon a rule to show cause why the nonsuit should not be set aside.

But a sheriff's officer, who discharges a defendant on payment of the sum sworn to, and is afterwards obliged to pay the residue of the debt in order to prevent an attachment against the sheriff, may recover it from the defendant as money paid to his use. For *per Buller Just. (w)* "This is not a voluntary payment, the officer would have been obliged to pay the whole sum due by law; for though bail above cannot be charged with more than the sum sworn to, yet it is not so with the sheriff or the defendant, against whom the officer may recover the whole of his debt. To bring this within the case of *Eyles and Failkney*, the defendant should show some improper conduct in the officer; but if I were to determine that he had done wrong in this case, I must say, that a sheriff's officer could not in any case receive the debt and costs, and discharge the defendant, which might be attended with very mischievous consequences to the defendant."

So, in the case of *Wilson v. Milner*, (x) where a levy was made on the goods of a trader after he had committed an act of bankruptcy, and the money levied was paid over to the party; an action of trover was afterwards brought by the assignees against him, the sheriff, and the bailiff, in which damages were recovered; and these together with the costs, were paid by the bailiff. It was holden by Lord *Ellenborough* Ch. J., "That there is no implied promise on the part of the plaintiff in the original suit to indemnify the bailiff, or to contribute to the damages and costs in the action of trover; but that the bailiff might maintain money had and received to recover back the levy money paid over."

(w) Peake's Cas. N P. 143. *Cordron v. Lord Mauserene*.

(x) 2 Campb. 452.

CHAPTER VII.

ON PROMISES TO PAY MONEY DUE UPON AN ACCOUNT STATED ;
AND IN WHAT CASES AN ACTION OF *INDEBITATUS ASSUMPSIT* WILL LIE THEREON.

IF two persons, having dealings together, balance their accounts, the law implies that he against whom the balance appears, has engaged to pay it to the other, though there be not any actual promise : and upon such implied promise an action of *indebitatus assumpsit* will lie. And actions of this kind are frequently brought ; and in which the declaration states generally, that the plaintiff and defendant had settled their accounts together, *insimul computassent*, (which gives name to this species of *assumpsit*;) and that the defendant engaged to pay the plaintiff the balance, but has since neglected to do it. (a) Thus, in the case of *Egles v. Vale*, (b) in error, which was an action of *assumpsit*, “ for that the plaintiff and defendant accounted together for monies received by the defendant, who was found in arrear 10*l.*, and in consideration thereof promised to pay it the 19th *March* following,” &c. It was assigned for error, that there was no consideration ; for the being found in arrear is not any cause to make a special promise, nor is any thing done on the plaintiff’s part whereon this promise should be grounded, viz., forbearing the suit, &c. *Sed non allocatur* ; for the debt itself, without other special cause, is sufficient to ground the action.

So, where partners balance their joint accounts *inter se*, the partner in whose favour the balance is struck may maintain an action of *assumpsit* against his co-partner for the amount of such balance, declaring generally upon an account stated. (c) So, where A. and B. having been partners in a particular commercial adventure, A. sends to B. an account stating a loss, and B. on application for one moiety of such loss, says that he will call and settle with A. This is evidence of an adjustment of the amount between the parties, in an action by A. to recover the moiety. (d)

(a) Vide 3 Bl. Com. 164. (c) 2 Term Rep. 479. 483. n. et vide
(b) Cro. Jac. 69. Yelv. 70. S. C. See post. tit. Partners.
also 1 Rol. Abr. fo. 7. pl. 1. fo. 9. pl. 11. (d) *Clarke v. Glennie*, 3 Stark. 10.
2 Mod. 44. 1 Dan. Abr. 52.

So, where parties having cross demands, settle and balance their accounts, though part of the plaintiff's demand was upon a transaction for which no action could be supported, the settlement of the accounts shall bind the defendant, so that he cannot set up that defence to an action for the balance. (e)

So, upon an agreement between two traders to supply each other, on the footing of goods for goods, after a balance struck between them, such balance is to be paid in money. (f) So, in *Salmon v. Watson*, (g) where the defendant agreed verbally with the plaintiff to take a house, and purchase the fixtures at a valuation to be made by two brokers. An inventory of the furniture and fixtures was accordingly made, described generally as "An inventory of the fixtures, &c." with the gross amount placed at the foot thereof. In an action for goods sold and delivered, with a count on an account stated; the Court of Common Pleas held, that the defendant having taken possession of and enjoyed the furniture and fixtures, and paid part of the sum determined by the brokers to be due for the same, he was liable on the account stated for the remainder, and could not afterwards object to the plaintiff's defective title to the house.

So, an admission by a defendant that so much was agreed to be paid to the plaintiff for the sale of standing trees, made after the trees had been felled and taken away by the defendant, will support a count upon an account stated; though not for goods sold and delivered. (h)

So, proof of the acknowledgement of one item of a debt only is good to support an action upon a count stating money to be due upon an account between the plaintiff and the defendant. Thus, in the case of *Highmore v. Primrose*, (i) which was an action upon a bill of exchange at the suit of the indorsee against the acceptor; and upon an account stated. At the trial, it appeared that there was a variance between the bill produced and the declaration; and therefore the plaintiff was obliged to resort to the count upon an account stated; and to support which he proved, that the defendant upon being applied to for payment of the bill admitted it to be his, but alleged his inability to pay at that time. It was objected, that the plaintiff could not recover on the first count by reason of a variance, the count describing the bill as drawn for value received by the drawer, the words "value received" in the bill itself importing value received by the drawee: secondly, that the defendant's admission being confined to one item, viz. the bill, the evidence was not sufficient to sustain the count upon an account stated. And these points being reserved, a verdict was given for the plaintiff. A rule nisi for a nonsuit having been obtained, the Court, after argu-

(e) *Dawson v. Remnant*, 6 Esp. 24.

(f) *Ingram v. Shirley*, 1 Stark. 185.

(g) 4 Mo. 73.

(h) *Knowles v. Michel*, 13 East Rep.

249. See also *Teall v. Anty*, 4 Mo. 542.

(i) 5 Maule & Sel. 65.

ment, determined that the plaintiff was entitled to recover; and Lord *Ellenborough* Ch. J. said, "I think *Knowles v. Michel* (*k*) is an authority to show, that though in form a count upon an account stated is "of and concerning divers sums of money," yet proof of one item is good to maintain such a count; divers may be supported by evidence of one. The practice, I believe, has been so, and if there is any variation from it, it has arisen from not attending to the form of the count: the count does not import a mutuality of account, and there seems to be no reason why an account should not be stated consisting of one item only as a plurality." And *Holroyd* Just. said, "It has been held, that upon a count for goods sold and delivered, the plaintiff may prove the sale of one article, and that will be well enough. The same rule applies to this count, which is 'of and concerning divers sums,' as to the count for goods sold. If the count be good, it is enough if the plaintiff prove any part of it."

A promissory note reciting that "the defendant had been awarded to pay 500*l.* to the representatives of *J. S.*; and that he had paid him 100*l.* in his lifetime, and thereby promised to pay his representatives 400*l.* three months after his death pursuant to the award, first deducting thereout any interest or money *J. S.* might owe to the defendant on any account;" may be given in evidence in an action brought by the representatives of *J. S.* against the defendant, on an account stated between him and *J. S.*, although it was improperly stamped as a promissory note. (*l*)

So, where a collector or renter of turnpike tolls, though illegally appointed, without the forms prescribed by the act of parliament, may still recover upon a count for an account stated, the amount of the tolls for which he had credited the defendant passing through the gate; no objection being made to the plaintiff's title by the trustees or creditors of the turnpike. And the plaintiff having sent to the defendant an account of the tolls due, who not long after sent 5*l.* inclosed in a letter to the plaintiff, in which he stated that he should have *the remainder* next week, is evidence of such an account stated, and a recognition of the intestate's title to be accounted with for the tolls. (*m*)

So, evidence of an account stated, whereby the defendant admitted a certain balance due to the plaintiff, is not done away, but confirmed in support of an *assumpsit*, by evidence of a foreign judgment recovered by the plaintiff for the same sum, with a stay of execution for six months to enable the defendant to prove a counter demand, if he had any: and the plaintiff not having declared till after that period, it was held no objection that the writ was sued out and the defendant arrested before. (*n*)

(*k*) Ante, 418.

(*l*) *Barlow v. Broadhurst*, 4 Mo. 471.

(*m*) *Peacock v. Harris*, 10 East Rep. 104.

(*n*) *Hall v. Odber*, 11 East Rep. 118.

CHAPTER VIII.

ON PROMISES TO PAY INTEREST : AND UPON WHAT CONTRACTS OR DEBTS INTEREST IS RECOVERABLE.

A CONTRACT or promise to pay interest is lawful if it do not exceed the rate allowed by the statute 12 Ann. c. 16. ; and an action of *assumpsit* or *debt* will lie for the recovery thereof. (a)

In actions of *assumpsit* for the recovery of money lent or paid, &c. ; and also for money due upon bills of exchange, and for goods sold and delivered, and other book debts, a contrariety of decisions have been made as to the plaintiff's right to recover interest. The general question, however, was much discussed in the case of *Calton v. Bragg*, (b) which was an action for goods sold and delivered, for money lent, money paid, money had and received, and also upon a count for interest. It was stated at the trial, before *Bayley* Just., that there had been a running account between these parties ; in the course of which the plaintiff had supplied the defendant with goods, and had also lent him several sums at different times, to the extent on one occasion of 100*l.* : the balance of the account, however, had been paid by the defendant to the plaintiff for the goods sold, and for the money lent, but not for interest on the latter ; which balance the plaintiff had received, saving his claim for interest, to recover which this action was brought ; and the learned judge directed the jury to find for the plaintiff for the amount of the interest proved, which was 35*l.* ; reserving the question for the opinion of the Court, whether interest was by law due, or could be recovered in such a case ; and the defendant's counsel had liberty to move to set aside the verdict and enter a nonsuit. This motion was accordingly made, and a rule to show cause granted ; *Bayley* Just. at the same observing, " That there was no evidence of any course of dealing between the parties, from whence it might be inferred that interest was tacitly agreed to be taken." The case was fully argued, and all the former authorities cited. But the Court determined that

(a) Cro. Car. 272. Palm. 291. 10 Mod. 312. 5 Term Rep. 553. Com. Dig. tit. Action upon assumpsit. F. 4.

(b) 15 East Rep. 223.

interest could not be recovered. And Lord *Ellenborough* Ch. J., in delivering his opinion, said " It is not only from decided cases, where the point has been raised upon argument, but also from the long continued practice of the courts, without objection made, that we collect rules of law. Lord *Mansfield* sat here (b) for upwards of 30 years, Lord *Kenyon* for above 13 years, and I have now sat here for more than 9 years ; and during this long course of time, no case has occurred where, upon a mere simple contract of lending, without an agreement for payment of the principal at a certain time, or for interest to run immediately, or under special circumstances from whence a contract for interest was to be inferred, has interest been ever given. The mere form of the count cannot make any difference in this respect ; for in most cases it happens, that a plaintiff may either frame his count for money had and received, or for money lent. If interest were due in this case, why should it not also be due where goods are to be paid for at a certain day, when that time arrives, as Baron *Montagu* in one of the old cases is stated to have held ; or in any other case where money is to be paid at a certain day ? Those cases press closely upon the present. If there were any general rule for interest to run upon money due, why should it not be allowed upon all book debts ? Juries would give ear readily enough to such a direction ; but I dare not vary from the practice which has long prevailed in all the Courts of *Westminster-hall*. If it be fit that the whole course of our proceedings in respect to giving interest should be recast, it must be done by act of parliament. Where one directs his agent to advance money to another, what difference can it make as to the point of interest, whether he afterwards counts for money had and received, or for money lent. If interest were demandable generally upon money due, why should it have been thought necessary to introduce, as it has prevailed in practice, a particular count for interest agreed to be paid where the law would have given it without such an agreement. But in fact there has been no instance of its being allowed except upon written securities for the payment of money at a given time, or upon an express or implied agreement for it. The judgment of Lord *Mansfield* in the case of *Robinson v. Bland*, (c) and of the eminent judges who sat with him, shows that interest is not due without a contract for it for they would never have resorted to the argument of intention, to be collected from the giving a void bill of exchange, in order to support the claim of interest, if the law would have given it without, upon the mere loan of money. Where a balance has been settled upon an allowance of interest in a banker's books, that is an admission by the party of a contract to pay interest on the sums advanced to him by the banker. The cases in equity also show the understanding which has prevailed

(b) Court of King's Bench.

(c) 2 Bur. 1077. 1085.

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upon this subject, not only in those Courts, but also in the Courts of law ; as Lord *Alovanley*, when Master of the Rolls, states, in *Parker v. Hutchinson*, (d) that he had received the rule there laid down from Lord *Kenyon*, as derived from the practice adopted at the sittings at Nisi Prius. It was said indeed in *Blaney v. Hendrick*, that interest is due upon *liquidated sums* from the instant the principal becomes due and payable. (e) But those words must be taken in a restricted sense, and I must understand by them something more than an account stated. If an account be stated, and the nature of the transaction be such as to afford evidence of an agreement for interest, as if it be shown to have been allowed before upon a prior settlement of accounts, then it may be warranted. But if it be understood as extending the claim of interest upon money lent generally, without any certain time of payment, or any agreement for interest expressed or to be implied, I shall expect a body of authorities more strong and consistent than has yet been brought forwards, before I can venture to say that it is allowable by law. Hitherto it has only been allowed upon written contracts for the payment of money at a given day, and upon contracts express or implied for the payment of interest. If it be fit that the rule should be carried further, it must be done by the legislature."

Mr. Justice *Grose* said, " During all my experience I have never known interest given upon money lent, or due for goods sold, or in any other case but upon a contract for interest express or implied. It is the lender's own fault if he do not contract for interest when he advances the money : but the law has long been settled, as I have stated. Why should interest be paid at all without a contract for it ? If there be no proof of a contract, it might be given against the intention of the parties at the time of the loan. If they did not then contract for interest, it shows that they did not mean to reserve it. To allow interest therefore in this case would be inconsistent with the practice which has long prevailed in *Westminster-hall*, and to the general understanding of mankind upon the subject ; it would not be reasonable but unjust ; there is uniform usage against it, and the claim is unauthorised by law."

So, in the recent case of *Higgins v. Sargent*, (*) it was held, that in covenant upon a policy of insurance upon the life of A., payable six months after due proof of his death, the assured are not entitled to recover interest upon the principal sum insured, from the expiration of six months after due proof of the death of A.

And *Abbott* Ch. J. said, " It is now established as a general principle,

(d) 3 Ves. Rep. 133.

(e) It is so stated in the report of the case in 2 Bl. 761. But the statement in 3 Wils. 206. is, that " upon an account stated between merchant and merchant,

it shall carry interest from the time it was liquidated : " which is more plainly referable to an implied contract by the usage of trade.

(*) 2 Barn. & Cres. 348.

that interest is allowed by law only upon mercantile securities, or in those cases where there has been an express promise to pay interest, or where such promise is to be implied from the usage of trade or other circumstances. It is of importance that this rule should be adhered to ; and if we were to hold that interest was payable in this case, the application of the general rule might be brought into discussion in many others."

And *Holroyd*, Just. said, " It is clearly established by the latter authorities, that unless interest be payable by consent of the parties, express, or implied from the usage of trade (as in the case of bills of exchange), or other circumstances, it is not due by common law. In *De Haviland v. Bowerbank* (f), Lord *Ellenborough* was of opinion, that where money of the plaintiff had come to the hands of the defendant, to establish a right to interest upon it, there should either be a specific agreement to that effect, or something should appear from which a promise to pay interest might be inferred, or proof should be given of the money being used ; and in *Gordon v. Swan* (g) the same noble and learned judge said, that the giving of interest should be limited to bills of exchange, and such like instruments and agreements reserving interest. In the latter case, although the money was payable at a particular day, non-payment at that day was held not to give any right to interest. Independently of these authorities, I am of opinion upon the principles of the common law, that interest is not payable upon a sum certain, payable at a given day. The action of debt was the specific remedy appropriated by the common law for the recovery of a sum certain. Now in that action the defendant was summoned to render the debt, or show cause why he should not do so. The payment of the debt satisfied the summons, and was an answer to the action. If this therefore had been an action of debt, the payment of the principal sum would have been a good defence, because the interest is no part of the debt, but is claimed only as damages resulting from the non-payment of the debt. When, indeed, the interest becomes payable by virtue of a contract express or implied, then it becomes part of the debt itself, and consequently it would then be no answer to an action of debt for the defendant to show that he had paid the principal sum advanced. Here, there being no contract, either express or implied, to pay interest, it was no part of the debt, but could only be recovered by way of damages for detaining the debt. Inasmuch, therefore, as it appears, that if the plaintiff had pursued that remedy which by the common law is specifically applicable to his case, he could not have recovered interest : I think that he ought not to be permitted to recover interest by way of damages in an action of covenant. I cannot, therefore, say that the jury ought to have given interest in this case, and I doubt

(f) Post, 424.

(g) Post, 124.

much whether the verdict could have been supported if they had done so."

Now it may be collected from these and several other cases which will be cited, that, as a general and established rule, interest is allowed and recoverable in the following cases. First, where there is an express promise to pay interest (*h*); secondly, upon bills of exchange and promissory notes, and other commercial instruments or contracts, upon which interest is usually paid and allowed (*i*); thirdly, upon awards, where the money awarded is to be paid at a certain day, and it has been demanded (*k*); fourthly, in all cases where, from the usage of trade, or the general course of dealing between the parties, an intention to pay and allow interest may be reasonably inferred; as for instance, where goods sold are to be paid for by a bill of exchange, and the buyer refuses to give the bill, the seller is entitled to interest from the time when the bill, if given, would have become due (*l*): and so upon a similar contract where the buyer refuses to accept the goods bought. (*m*)

But interest is not allowed in actions for goods sold and delivered without such an agreement, even though the price is to be paid at a certain day. (*n*) Nor for work and labour or other book debts, unless there be a special agreement or particular usage to pay interest. (*o*)

So, interest cannot be recovered in an action for money had and received, unless it can be proved that the defendant has used the money, or something shall appear from which a promise to pay interest may be inferred. (*p*) Nor upon the balance of a settled account, without either an express promise to pay interest, or it has been allowed upon former balances. (*q*) Nor upon a policy of insurance. (*r*)

So, compound interest is not recoverable: and therefore in an action by bankers for money over drawn, the court will allow only simple interest upon the sums actually advanced; not interest upon rests or balances struck by them at stated times, where such balances are partly made up of the interest already incurred. (*s*) unless interest has

(*h*) See the case of *De Haviland v. Bowerbank*, 1 Campb. 50.

(*i*) *Ibid.*, and see *Bayley & Chitty on Bills*.

(*k*) *Penhorn v. Tuckington*, 5 Campb. 468. *Marquis of Anglesea v. Chafey*, Manning's Index. 185. See also 1 East. Rep. 400. *Sed quære*; *vid. ante*, 425.

(*l*) *Becher v. Jones*, 2 Campb. 428.

(*m*) *Porter v. Palgrave*, *ib.* 472. See also *Boyce v. Warburton*, *ib.* 480.

(*n*) *Gordon v. Swan*, *ib.* 429. 13 East. 419. *Chalie v. The Duke of York*, 6 Esp. Rep. 45.

(*o*) *Calton v. Braggs*, *ante*, 420. See also *Bunb.* 119. 3 Wils. 206. 2 Bl. Rep. 672. 1 H. Bl. 305. 4 Bro. P. Cas. 539.

(*p*) *De Haviland v. Bowerbank*, 1 Campb. 50. *De Bernales v. Fuller*, 2 Campb. 426. 14 East. Rep. 490.

(*q*) *Chalie v. The Duke of York*, 6 Esp. Rep. 45. *Nichol v. Thompson*, 1 Campb. 52. n.

(*r*) *Kingston v. McIntosh*, 1 Campb. 518.

(*s*) 1 *Davies v. Pinner*, 2 Campb. 426.

been allowed in former settled accounts, (t) or the customer is informed and knows that such is the practice of the house. (v)

Upon bills of exchange or other written instruments interest is generally allowed from the date, except when it is otherwise expressed, or when it is made payable on demand. In the latter case it is allowed from the time of the demand only. (u)

(t) *Bruce v. Hunter*, 3 Camp. 467. v. *Richmond*, lb. 507. See also Chitty
(v) *Moore v. Foughton*, 1 Stark. 487. on Bills, 537. 5 Ed.
(u) *Kennedy v. Nash*, lb. 452. *Hopper*

CHAPTER IX.

OF CONTRACTS TO ACCEPT OR REPLACE STOCK: AND OF THE STATUTE REGULATING SUCH CONTRACTS, AND ALSO TO PREVENT STOCK-JOBGING. AND OF THE MEASURE OF DAMAGES FOR BREACH OF CONTRACT.

IN order to prevent the pernicious and destructive practice of stock-jobbing, and to regulate contracts made for accepting and transferring stock, an Act of Parliament was passed very early in the reign of *George the Second* (a), intituled, "An Act to prevent the infamous practice of stock-jobbing," which, after reciting "Whereas great inconveniences have arisen, and do daily arise by the wicked, pernicious, and destructive practice of stock-jobbing, whereby many of his Majesty's good subjects have been and are diverted from pursuing and exercising their lawful trades and vocations, to the utter ruin of themselves and families, to the great discouragement of industry, and to the manifest detriment of trade and commerce: for remedy thereof, it is enacted, "That all contracts and agreements whatsoever which shall be made or entered into by or between any person or persons whatsoever, upon which any premium, or consideration in the nature of a premium, shall be given or paid for liberty to put upon, or deliver, receive, accept, or refuse any public or joint stock, or other public securities whatsoever, or any part, share, or interest therein, and also all wagers, and contracts in the nature of wagers, and all contracts in the nature of putts, and refusals, relating to the then present or future price or value of any such stock or securities as aforesaid, shall be null and void, to all intents and purposes whatsoever; and all premiums, sum or sums of money whatsoever, which shall be given, received, paid, or delivered, upon all such contracts or agreements, or upon any such wagers, or contracts

(a) 7 Geo. II. c. 8. and made perpetual by 10 Geo. II. c. 8. This statute is frequently called *Sir John Barnard's Act*; it having been brought into Parliament and framed by him.

in the nature of wagers, as aforesaid, shall be restored and repaid to the person or persons who shall give, pay, or deliver the same, who shall be at liberty, within six months from and after the making such contract, or agreement, or laying any such wager, to sue for and recover the same from the person or persons to whom the same is or shall be paid, or delivered, with double costs of suit, by action of *debt*, founded on this act, to be prosecuted in any of His Majesty's courts of record, in which action no essoign, protection, wager of law, or more than one imparlance shall be allowed; and it shall be sufficient therein for the plaintiff to allege that the defendant is indebted to the plaintiff, or has received to the plaintiff's use the money or premium so paid or received, whereby the plaintiff's action accrued to him, according to the form of this statute, without setting forth the special matter."

And for the better discovery of the monies, or premium, which shall be given, paid, or delivered, and to be sued for and recovered as aforesaid, it is enacted, by the second section of the act, "that all and every the person or persons, who, by virtue of this present act, shall or may be liable to be sued for the same, shall be obliged and compellable to answer, upon oath, such bill as shall be preferred against him or them, in any court of equity, for discovering any such contract or wager; and the sum of money, or premium, so given, paid, or delivered as aforesaid." But by section 3, it is provided, always, "that the plaintiffs, relators, or informers in such bill shall and do (at the same time of bringing or filing such bill) give good and sufficient security to answer and pay the defendants in such bill full costs of suit, in case such costs shall be adjudged to the defendants; and that no person shall be obliged to appear, or to answer such bill until such security is given."

By section 4. it is further enacted, "That all and every person or persons whatsoever, who shall enter into, make, or execute any such contract, bargain, or agreement, upon which any premium, or consideration in the nature of a premium, shall be given or paid for liberty to put upon, or to deliver, receive, accept, or refuse any public or joint stock, or other public securities whatsoever, or any part, share, or interest therein, or any contract, or bargain, in the nature of putts and refusals, as aforesaid, or shall lay any such wager, or make any such contract in the nature of a wager, as aforesaid, (except such person or persons who shall actually and *bonâ fide* without covin or collusion, sue, and with effect prosecute for the recovery of the money or premium given, delivered, or paid by him, her, or them, as aforesaid; and also except such person or persons, who shall voluntarily, before any action or suit commenced, actually and *bonâ fide*, without covin or collusion, repay or tender, before one or more witness or witnesses, such money, or premium, as he, she, or they shall have had, taken, received, or been paid, as aforesaid, and also except such person or persons, who shall

discover such transaction, in any court of equity,) shall forfeit and pay the sum of 500*l.*; and also all and every brokers, agents, scriveners, or other persons negotiating, transacting, or writing any such contract, bargain, or agreement, as aforesaid, shall likewise forfeit and pay the sum of 500*l.*"

And for preventing the evil practice of compounding, or making up differences for stocks, or other securities bought, sold, or at any time hereafter to be agreed so to be, the 5th section of the act enacts, "That no money, or other consideration whatsoever, (except as hereinafter is provided,) shall be voluntarily given, paid, had, or received, for the compounding, satisfying, or making up any difference for the not transferring, having, or receiving any public or joint stock, or other public securities, or for the not performing of any contract, or agreement, so stipulated and agreed to be performed; but that all and every such contract and agreement shall be specifically performed and executed on all sides, and the stock or security thereby agreed to be assigned, transferred, or delivered, shall be actually so done, and the money or other consideration thereby agreed to be given and paid for the same, shall also be actually and really given and paid; and all and every person and persons whatsoever who shall voluntarily compound, make up, pay, satisfy, take, or receive such difference-money, or other consideration whatsoever, for the not delivering, transferring, assigning, having, or receiving such stock, or other security, so to be agreed to be delivered, transferred, assigned, had or received, as aforesaid (except in the manner hereinafter provided) shall forfeit and pay the sum of 100*l.*"

By the 6th section it is provided, nevertheless, "That no person, or persons, who shall sell any public or joint stock, or other public securities, to be delivered and paid for on a certain day, and which shall be refused or neglected to be paid for, according to such agreement, shall be obliged to transfer the same: but it shall and may be lawful for such person, or persons, to sell such stock, or other securities, which shall be so refused or neglected to be paid for, to any other person or persons, for the best price which can be obtained, and, after such sale, to receive (if the parties can agree) or to recover, as aforesaid, from the person or persons who first contracted for the same, all the damage which shall be sustained thereby."

And by the 7th section it is also provided, "That it shall and may be lawful to and for any person or persons, who shall buy any public or joint stock, or other public securities, to be accepted and paid for on a future day, and which shall be refused, or neglected to be transferred, to buy the like quantity of such stock, or other public securities, of any other person or persons, at the current market price; and to recover and receive, after such purchase and acceptance, (if the parties can agree) from the person or persons who first contracted to sell or

deliver the same, the damage which shall be sustained by reason of the not delivering or not transferring such stock, or other securities; any thing in this act, or any law, usage, or custom to the contrary notwithstanding."

The 8th section of this act, after reciting, "Whereas it is a frequent and mischievous practice for persons to sell and dispose of stocks, or other securities, of which they are not possessed," enacts, "That all contracts and agreements whatsoever, which shall be made or entered into, for the buying, selling, assigning, or transferring of any public or joint stock or stocks, or other public securities whatsoever, or of any part, share, or interest therein, whereof the person or persons contracting or agreeing, or on whose behalf the contract or agreement shall be made, to sell, assign, and transfer the same, shall not, at the time of making such contract or agreement, be actually possessed of, or entitled unto in his, her, or their own right, or in his, her, or their own name or names, or in the name or names of a trustee or trustees, to their use, shall be null and void, to all intents or purposes whatsoever, and all and every person and persons whatsoever contracting or agreeing, or on whose behalf, and with whose consent any contract or agreement shall be made to sell, assign, or transfer any public or joint stock or stocks, or other public securities, whereof such person or persons shall not, at the time of making such contract or agreement, be actually possessed of, or entitled unto, in his, her, or their own name or names, or in the name or names of a trustee or trustees, to their use, or their own right, as aforesaid, shall forfeit and pay the sum of 500*l.*, to be recovered by action of debt, as aforesaid; one moiety thereof to the use of His Majesty, and the other moiety thereof to the use of him, her, or them who shall sue for the same: and all and every broker or brokers, agent or agents, who shall negotiate, transact, or intermeddle in the making, or procuring to be made, any such contract or agreement, as aforesaid, and shall know that the person or persons, by whom or on whose behalf such contract or agreement shall be made, is or are not possessed of, or entitled unto, the stock or security concerning which such contract or agreement shall be made, in his, her, or their own name or names, or in the name or names of a trustee or trustees, for their use or right, shall, for every such offence, forfeit and pay the sum of 100*l.*, to be recovered by action of debt, as aforesaid."

By the 9th section it is enacted, "That all and every broker or brokers, or other person or persons, who shall negotiate or act as a broker, receiving brokerage in the buying, selling, or otherwise disposing of any of the said public or joint stocks, or other public securities, shall respectively keep a book or register, which shall be called the broker's book; in which said book he and they shall fairly, justly, and

truly enter all contracts, agreements, and bargains, that he or they shall, from time to time, make between any person or persons whatsoever, on the day of the making such contract or agreement, together with the names of the principal parties, as well buyers as sellers, and also the day of making such contract or agreement, to the intent and purpose that such broker or broker or brokers, and other person or persons acting or negotiating as such, as aforesaid, shall, from time to time, produce such book or register, when thereunto lawfully required: and in case such broker or brokers, or any other who shall negotiate, or act as a broker, as aforesaid, in relation to any of the said matters, shall not keep such book or register, or shall wilfully omit to enter therein, fairly, justly, and truly, any such contract, bargain, or agreement as aforesaid, he or they shall, for every such offence or omission, forfeit and pay the sum of 50*l*."

And by the 11th section it is also provided and enacted, "That nothing in this act contained shall extend, or be construed to extend, to hinder or prevent any person or persons from lending any sum or sums of money on any public or joint stocks, or other public securities whatsoever, or any part, share, or interest therein, or to prevent or hinder any defeazance, contract, or agreement being made or entered into for the re-delivering, assigning, or transferring such public or joint stock, or other public securities, or any part, share, or interest therein, upon the re-payment of the sum or sums of money which shall have been lent and borrowed thereupon, with interest for the same, so as no premium, or other consideration whatsoever be paid to, or received by the person or persons lending such money, for or in consideration of such loan, more than legal interest."

It is lawful for a person to sell out stock, and advance the produce to another on his bond to replace the stock on a fixed day, and in the meantime pay the dividends, which would have accrued due if the stock had not been sold out, though such dividends might exceed legal interest; and though by the fluctuation in the price of stock the borrower might have to pay on the re-purchase much more than the sum he received; because in this case the borrower takes the chance of the fall as well as the rise of the funds; and in the former instance he would of course be a gainer, and the lender derives no undue advantage or greater profit than if his money had remained in the funds; but if the stipulation had been, that the borrower should repay a sum of money at a fixed day, which in contemplation of the parties would in all probability exceed the current price of that day of the same proportion of stock, then the contract would be illegal, because the borrower is not in that case afforded the fair chance of the fluctuation of the funds. (*b*)

(*b*) *Tate v. Wellings*, 3 Term Rep. 531.

A stipulation to purchase stock in consideration of a pre-existing debt is valid. Thus, in the case of *Maddock v. Rumball*, (c) where the defendant being indebted to the plaintiff in 486*l.* 4*s.* 6*d.*, for which he was sued, and the plaintiff wishing to invest the amount of the debt in stock on the 19th of *November*, 1803, when the same would have purchased 908*l.* 16*s.* 7*d.* stock, in consideration of forbearing his action and demand till the 19th of *November*, 1804, takes a bond from the defendant, conditioned for the transfer by him to the plaintiff on that day of 908*l.* 16*s.* 7*d.* stock, with such interest as the same would have produced as such stock in the meantime: it was held, that this was neither usurious nor within the prohibition of the stock-jobbing act, 7 Geo. 2. c. 8.; and the Court said, "This was in effect a loan of stock. The plaintiff would have purchased stock at the price it stood on the 19th of *November*, 1803, if he had received his debt then; but he was content to take his debt in stock, to the same amount, at a future day: that is the case with every contract for the replacing of stock. The intention of the parties to a loan of stock is, that it should be sold, and the same quantity of stock repurchased at a future period by the borrower."

An agreement for the purchase of stock, to be transferred at a future day, at a price below the then value, is not usurious. This was settled in the case of *Pike v. Ledwell*, (d) where Lord *Ellenborough* Ch. J. said, "that whatever remedy the defendant might have in equity, on the ground of this being a catching bargain, he had none at law; contingency in the thing purchased was incompatible with the idea of usury, in which the principal must always be certain."

Jobbing in omnium, or mere time bargains thereon, is within the stat. 7 Geo. 2., and, consequently, void. (e) But an agreement for selling out omnium by a proprietor thereof, to be replaced in stock, is not illegal. Thus, in the case of *Oliverson v. Coles*, (f) which was an action on a special undertaking in consideration that the plaintiff would sell out omnium to the amount of 2000*l.*, to replace the same in stock, or to give the plaintiff the current price for it if he required it: on the part of the defendants it was objected, that the contract was illegal, since it amounted to an agreement to replace stock in consideration of selling out omnium, which was not stock, and which might never eventually become stock; since if default were to be made in one payment, the previous payments would all become forfeited; and therefore whether omnium might eventually become stock rested upon a contingency. But Lord *Ellenborough* Ch. J. said, "A person who has omnium is potentially in possession of stock. The case certainly differs from that of a sale of actually existing stock, but it does not come within the mischief intended to be guarded against by Sir *John Barnard's* Act."

(c) 8 East Rep. 304.

(d) 5 Esp. Rep. 164.

(e) 7 Term Rep. 630.

(f) 1 Stark. Rep. 496.

Upon the 6th section of this act, it has been determined, that to recover damages against one who had refused to accept and pay for stock agreed to be sold to him, it is necessary to prove an actual transfer of the stock to some other person, before the action brought; and proof alone of a contract to sell to such other person before the action brought, though followed up by an actual transfer afterwards, is not sufficient to sustain the action. Thus, in the case of *Heckscher and others v. Gregory*, (g) which was an action of *assumpsit* for not accepting the transfer of stock of 3 per cent. consols, purchased by the defendant of the plaintiff. The facts were as follow: the plaintiffs, who had written to their agent, Mr. *Eliason*, on the 22d of *April*, 1803, advising him to sell out their stock as soon as stocks rose to a certain price: and an opportunity offering for this purpose on the 5th of *May*, upon intelligence then supposed to have been communicated by one of His Majesty's secretaries of state, to the *Lord Mayor of London*, purporting that all differences subsisting between this country and *France* were happily terminated; (a letter which very soon afterwards turned out to be a forgery;) in consequence of which the stocks suddenly rose to 70½*l.* *Eliason's* broker contracted for the sale of the stock at that price to the defendant, and a transfer was, on the same day, directed to be made to him; and the ticket necessary for making the transfer was given in at the Bank. But before such transfer could be made, the fraud was discovered, and the defendant refused to execute his bargain, though the stock was formally tendered to him on the same day. In consequence of the defendant's refusal *Eliason* wrote to his principals abroad, the plaintiffs, and, on the receipt of their answer, the plaintiff's broker received directions to sell the stock on the 9th of *June* following; and a contract of sale was then accordingly made to a Mr. *Cope*, for 57½*l. ex. div.*; but as the stocks were then shut, no transfer could be made, nor was any in fact made till the opening on the 6th of *July*, 1803. The declaration was of *Trinity Term* 1803, and the memorandum on the *Nisi Prius* record was of the 25th of *June*, to which day, of course, the commencement of the action related. Upon these facts the Court were of opinion that an actual transfer was necessary to support the action; and for want of such transfer before the action brought, the plaintiff could not sustain the action. Lord *Ellenborough* Ch. J. said, "The object of the act was to prevent radically all dealings in stock by persons who were not proprietors, and who should not actually make a transfer of their interest in the stock. And, therefore, to entitle the proprietor to recover damages in any case for the non-performance of a contract for the purchase of his stock, he must either specifically carry that contract into execution, by first making a transfer to the party with

whom he contracted, according to the 5th section, or, in case of the insolvency or inability of the latter, by first making an actual transfer to a substituted purchaser, according to the provision of the 6th section; and then he may recover the difference against the original contractor. But in no case shall any consideration be voluntarily paid for the compounding any difference for the not transferring stock; but there must be an actual transfer: and then the difference between the purchase-money contracted for, and that actually received, shall be the measure of damage to be recovered. The 5th section requires that the contract shall be specifically performed: but that cannot be said to be a specific performance where any thing executory remains to be done. The stock agreed to be assigned, transferred, or delivered, shall be actually so done. The money, too, agreed to be given shall be actually and really given or paid. The 6th section merely enables the proprietor to substitute another purchaser in lieu of him with whom he had contracted, and who had refused or neglected to pay for the stock; but that is to be done in the same manner, by an actual sale and transfer, and then the price actually paid, compared with that which was contracted to be paid, is to form the measure of damages for the non-performance of the original contract. The acts says, that after such sale the party shall receive or recover the damage; but that cannot be till after the completion of the contract of sale which is by the transfer. In each case provided for by the act, there must be a specific contract of sale executed; and when the contract of sale is thus perfected, the difference is, that the party is entitled to recover in damages against the person with whom he had contracted, and who had refused to perform his contract. The words are, "That no person who shall sell any stock," &c. (h) There, indeed, the word sell is not used in its proper sense, as denoting a perfect and complete sale, but in a looser sense, as denoting a contract for sale, an inchoate sale, as it may be called, one to be perfected afterwards by an actual transfer: for the clause goes on to say, that no person who shall sell stock "to be delivered and paid for on a certain day, and which shall be refused or neglected to be paid for according to such agreement, shall be obliged to transfer the same;" but he may sell such stock to any other person, &c., and, after such sale, receive or recover from the first contractor the damages sustained by his breach of contract. But the whole context and spirit of the act shows that by the word sale, in the latter part, was meant, not merely a contract of sale, but a sale properly so called, followed up and perfected by an actual transfer: for otherwise the whole policy of the act might be defeated, as a man might make twenty contracts of sale of the same stock, and satisfy the words of the act, by stipulating for 'as many con-

(h) Ante, 428.

tracts of resale,' paying or receiving the difference, without the stock being ever actually transferred out of his own name. But there can be but one transfer of the same stock; and that was the security intended by the legislature for the reality of the transaction. Here it unfortunately happened that the stock was shut at the time when the contract of sale was made, in consequence of which no transfer could be made of it at the time: but we cannot supply the omission; and, for want of such transfer before the action brought, the requisite of the act has not been complied with, and the plaintiff cannot sustain his action."

So, in the case of *Bordenave v. Gregory*, (i) it was determined, that in an action for not accepting stock agreed to be transferred on request, an averment that the plaintiff was ready and willing to transfer, and requested the defendant to accept the stock which he refused, can only be satisfied by showing an *actual* tender and refusal, or that the plaintiff waited at the Bank, on the day when it was understood that the transfer was to be made, until the close of the books, which was the latest time when the transfer could be made. But in such action it is not necessary for the plaintiff to show that he transferred the stock to another at the next possible transfer day, after default made by the original contractor, provided the stock were transferred before the action brought; though, if the plaintiff might have obtained more for the stock by a sale on any intermediate day, between the original default and the actual sale, that will go in reduction of the damages sustained by the plaintiff by such default. The reporter adds, that the majority of the judges of the court were of opinion that the act of parliament did not require, as a condition precedent to maintaining the action for damages for not performing a contract to purchase and accept stock, that the proprietor should, on the defendant's neglect or refusal to accept the stock, have sold it to another on or before the next transfer day after such default: but it merely says, that it shall be lawful for him to sell such stock, not saying when. And it was sufficient, they intimated, if the stock were sold and transferred at any time prior to the commencement of the action against the defendant who had so made default; especially where due diligence had been used by the proprietor, as the jury had found in this case. Though if the stock had risen in value, in the intermediate time between the default of the defendant and the time when the stock was actually sold and transferred, so that the plaintiff might have obtained a higher price than that for which it was actually sold, but less than the price contracted for by the defendant, they thought it material for the consideration of the jury, in assessing the damages; because the statute directs, that the party injured shall recover from the person who first contracted for the purchase of the stock, "all the damage which shall

(i) 5 East Rcp. 107.

be sustained thereby," that is, from his default; and the damage to be sustained thereby does not necessarily mean the difference of the price on the day of the actual sale, and that for which it was contracted to be sold: for if he might have obtained more at any intermediate time, he may not be said to have thereby sustained (that is, by the default of the defendant,) the damage which he incurred by waiting, but by his own default. The jury therefore were, in each case, to inquire whether the plaintiff might not have sold sooner than he did, and thereby saved part of the loss.

Upon the 8th section of the act it has been decided, that if A., being possessed of a certain quantity of stock, empowers B., at his request, to sell the same for his own benefit, in consideration of which B. agrees to transfer, at the next opening, the same quantity of stock in A.'s name, such a contract is not prohibited by the act; but that, on failure of B.'s engagement, A. may maintain an action of *assumpsit* against B. to recover the value of the stock. Thus, in the case of *Sanders v. Kentish and Hawksley*,^(k) which was an action of *assumpsit* for not transferring 3000*l.* 4*per cents.* into the plaintiff's name, at the opening day in April, 1795; on the trial, a verdict was found for the plaintiff for 2820*l.*, subject to the opinion of the Court of King's Bench on the following case:—

On the 1st of December, 1794, the plaintiff, being possessed of the sum of 3000*l.* 4*per cent.* annuities, executed to the defendant, *Kentish*, a letter of attorney, empowering him to sell the same, and to apply the produce for his own benefit; in consideration of which, *Kentish*, and the defendant *Hawksley*, as a surety for *Kentish*, signed an engagement, or undertaking, whereby they engaged "on the opening of the 4*per cents.* consols, to transfer 3000*l.* 4*per cent.* annuities, in the name of the plaintiff, in lieu of the same sum sold by him on account of *Kentish*." On the 3d of December, 1794, the defendant, *Kentish*, by virtue of the letter of attorney, sold and transferred the said stock to three different persons, for 2516*l.* 5*s.*, which he received for his own use. No stock was transferred to the plaintiff according to the above agreement. The defendants, at the time of making the agreement to transfer the stock as aforesaid, were not, nor was either of them possessed of or entitled to, in their or either of their own name or names, or in the name or names of a trustee or trustees, to their or either of their use, of any such stock as in the contract or agreement mentioned, or any 4*per cent.* annuities whatsoever. The question was, whether the plaintiff was prevented from recovering by the statute 7 Geo. 2. c. 8. s. 8.? The Court were of opinion, that the contract was valid, and not prohibited by the statute, and that the plaintiff was entitled to recover. And Lord *Kenyon* Ch. J. said, "It is impossible to read this case without feeling great indignation at the con-

(k) 8 Term Rep. 162. 2 Esp. Rep. 698. S. P.

duct of the defendant *Kentish*. The case is shortly this : the defendant, *Kentish*, who is a stockbroker, and who was therefore most probably acquainted with the statute on which his counsel has now relied, applied to the plaintiff, a clergyman, who was probably ignorant of that law, and obtained from him a loan of 3000*l.* stock, on an undertaking to replace the same stock on a given day ; from this transaction the plaintiff was to derive no advantage whatever ; the plaintiff gave him a letter of attorney, empowering him to sell the stock ; he then put the money into his pocket, and when the day of payment arrived refused to pay the plaintiff, insisting that the statute rendered the contract void, and that therefore the plaintiff cannot enforce that contract in a court of law. To be sure if such were the positive provisions of that statute, the consequence must follow, however hard it might press upon the plaintiff. But before we assented to so monstrous a proposition, we would look with eagle's eyes into every part of the statute, to see that such was the intention of the legislature. Their intention is to be collected from the whole act taken together. The act is intitled ' An Act to prevent the infamous Practice of Stock-jobbing.' But if the defendant's objection were to prevail, the title of the act ought to be altered, and it should run thus, ' An Act to encourage the wickedness of Stock-jobbers, and to give them the exclusive privilege of cheating the rest of Mankind.' On considering the whole of the act together I am clearly of opinion, that its object was only to prevent gambling in the funds ; but the legislature did not mean to prohibit a loan of stock, and an undertaking to replace it. I do not think that this case comes within the meaning of the prohibitory clauses in the act, but it is within the exception in the last section."

In estimating the measure of damages in an action for breach of a contract to replace stock on a fixed day, it is not enough to take the value of the stock on that day, if it has risen in the meantime, but the highest value as it stood at the time of the trial, there being no offer of the defendant to replace it in the intermediate time, while the market was rising. (*l*) And in the case of *M'Arthur v. Lord Seaforth*, (*m*) which was an action upon a bond conditioned for replacing stock, it was decided, that the obligee is not entitled to special damages for a profit which he might have made if it had been sooner replaced, unless he shows that he actually would have made it : but that on a failure to replace stock, the measure of damages is the price at the day when it ought to have been replaced, or the price at the day of the trial, at the option of the plaintiff ; but not the highest price at any intermediate day : and it appearing that the plaintiff gave a bond conditioned to replace 5 *per cent.*

(*l*) *Shepherd v. Johnson*, 2 East Rep. 211. *Downs v. Bach*, 1 Stark. Rep. 218. S.P.

(*m*) 2 Taunt. 257.

stock on a given day : after that day Government gave the holders of that stock an option to be paid off at par, or to commute their stock for 3 *per cents.* ; the plaintiff expressed to the defendant a wish to have the stock replaced, that he might be paid at par, but no wish to take 3 *per cent.* stock : it was held, that he was not entitled to recover the price of so much 3 *per cent.* stock as he might have exchanged for the 5 *per cents.*

CHAPTER X.

OF AGREEMENTS NOT TO CARRY ON TRADE WITHIN
CERTAIN LIMITS, &c.

IF a man for a valuable consideration agree that he will not exercise his trade or profession within a particular place, he shall be bound by it: but a promise or obligation which binds any to a total restraint of trade, whether for a limited time or generally, is unlawful and void. (a)

Thus, in the case of *Mitchell v. Reynolds*, (b) which was an action of debt on bond. The defendant prayedoyer of the condition, which recited, that whereas the defendant had assigned to the plaintiff a lease of a messuage and bakehouse in *Liquorpond Street*, in the parish of *St. Andrew, Holborn*, for the term of five years: now if the defendant should not exercise the trade of a baker within that parish, during the said term, or, in case he did, should within three days after proof thereof made, pay to the plaintiff the sum of 50*l.*, then the said obligation to be void: which being read and heard, he pleaded that he was a baker by trade, that he had served an apprenticeship to it, *ratione cujus* the said bond was void in law, *per quod* he did trade *prout ei bene licuit*. Whereupon the plaintiff demurred in law. And after this matter had been several times argued at the bar, *Parker* Ch. J. delivered the resolution of the Court as follows: "The general question upon this record is, whether this bond, being made in restraint of trade, be good? And we are all of opinion, that a special consideration being set forth in the condition, which shows it was reasonable for the parties to enter into it, the same is good; and that the true distinction of this case is, not between promises and bonds, but between contracts with and without consideration; and that wherever a sufficient consideration appears to make it a proper and an useful contract, and such as cannot be set aside without

(a) Vide Com. Dig. tit. Trade, (D.) 3.

(b) 1 P. Wms. 181. Note, this case has fully settled and established the law on this subject; and put at rest any seeming difference of opinion in former cases.

injury to a fair contractor, it ought to be maintained, but with this constant diversity, viz. where the restraint is general not to exercise a trade throughout the kingdom, and where it is limited to a particular place; for general restraints are all void, whether by bond, covenant, or promise, &c. with or without consideration, and whether it be of the party's own trade or not. Cro. Jac. 596. 2 Bulst. 136. Allen, 67. Particular restraints are either with or without consideration: such as are made without consideration, are void by what sort of contract soever created. 2 H. 5. 5 Moor, 115. 242. 2 Leon. 210. Cro. Eliz. 872. Noy, 98. Owen 143. 2 Keb. 377. March 191. Show. 2. (not well reported.) 2 Saund. 155. But particular restraints with consideration are valid. Thus, where a contract for restraint of trade appears to be made upon a good and adequate consideration, so as to make it a proper and useful contract, it is good. 2 Bulst. 136. *Rogers v. Parry*. Though that case is wrong reported, as appears by the roll, which I have caused to be searched, it is B. R. Trin. 11 Jac. 1. Rot. 223. And the resolutions of the judges were not grounded upon its being a particular restraint, but upon its being a particular restraint, with a consideration; and the stress lies on the words, as the case is here, though, as they stand in the book, they do not seem material. Noy, 98. W. Jones, 13. Cro. Jac. 596. In that case, all the reasons are clearly stated, and, indeed, all the books, when carefully examined, seemed to concur in the distinction of restraints general, and restraints particular, and with or without consideration, which stand upon very good foundation. *Volenti non fit injuria*; a man may, upon a valuable consideration, by his own consent, and for his own profit, give over his trade, and part with it to another in a particular place."

The principle of this case was afterwards recognized and adopted in the case of *Chesman* and *Elizabeth* his wife v. *Nainby* in error, (c) which was an action brought by the defendant in error against the plaintiff in error in *Easter Term* 1725, in the Court of Common Pleas, on a bond dated the 5th of *October*, 1721, for 100*l.* entered into by *Elizabeth*, when unmarried, to the defendant. To this action the plaintiffs pleaded, and set forth the condition of the bond, which was in the words following, viz. "Whereas the above named *Margery Nainby*, at the special instance and request of the above bounden *Elizabeth Vickers*, is to take her the said *Elizabeth Vickers*, for her hired servant, to attend in her shop, and to inspect her customers there, and to show her goods, and further to stand by and assist her the said *Margery* in her said trade and business of a linen-draper, whereby it is presumed the said *Elizabeth*, if she continues any length of time in the said service of the said *Margery*, may become a perfect and knowing person in the said trade and mystery. And whereas the said *Margery Nainby* consents to hire

(c) 1 Bro. P. C. 234. 2 Stra. 739. 2 Lord Raym. 1456. S. C.

and take her the said *Elizabeth Vickers*, upon and in consideration only, upon the express promise and agreement of the said *Elizabeth*, that she shall not, nor will at any time, after she shall have left the service of her the said *Margery*, set up or exercise the said trade or mystery of a linen-draper, either by herself, or by any other person or persons in trust for her, or for her use, either directly or indirectly, in any shop, room, or place, *within the space of half a mile of the now dwelling house of the said Margery Nainby*, situate in *Drury Lane*, or of any other house that she the said *Margery Nainby*, her executors or administrators, shall think proper to remove to, in order to carry on the said trade of a linen-draper; nor shall she, the said *Elizabeth*, *within the same space of half a mile*, directly or indirectly, be concerned in, or assist or instruct any other person or persons in the managing and carrying on the said trade, under colour or pretence of being a servant to such person or persons, or under any other colour or pretence whatever. Which said express promise and agreement, joined with the good character and opinion that she the said *Margery* hath of the integrity and honesty of her the said *Elizabeth*, is the sole consideration and inducement that has obliged the said *Margery* to take the said *Elizabeth* into her service for the space of three years. Now the condition of the above obligation is such, that if the said *Elizabeth Vickers* shall act contrary to and in breach of the above recited promise and agreement, according to the true intent and meaning thereof, or of any part thereof; that then and in such case, the said *Elizabeth Vickers*, her executors and administrators, shall thereupon pay or cause to be paid unto the said *Margery Nainby*, her executors, administrators, and assigns, the full and just sum of 100*l.* of good and lawful money of *Great Britain*, without fraud or further delay, the said sum of 100*l.* being the consideration money which is computed the said *Margery Nainby* might reasonably expect with an apprentice to the said trade; that then this obligation to be void, otherwise to be and remain in full force and virtue in law." And then the plaintiffs pleaded, that the said *Elizabeth* continued in the service of the said *Margery* to the 28th of *April*, 1724, and then departed, and left the said service; and that the said *Margery* continued to reside and exercise her trade in her said dwelling house in *Drury Lane*, from the time of making the said bond, to the day of suing out the original writ; and that she the said *Elizabeth*, *within the space of half a mile from the said dwelling-house of the said Margery*, at any time after the departure of the said *Elizabeth* from the service of the said *Margery*, directly or indirectly, was not concerned in or assisted, or instructed any person or persons whatsoever in managing or exercising the trade aforesaid, under colour or pretence of being a servant to such person or persons, or under any other colour or pretence whatsoever. And further, that she the said *Elizabeth*, at any time after her departure from the service

of the said *Margery*, did not use or exercise the said art or trade, either by herself, or any other person or persons in trust for her, or for her use, either directly or indirectly, in any shop, room, or place *within the space of half a mile from the dwelling-house of the said Margery.*

To this plea the defendant *Nainby* replied, that the said *Elizabeth*, from the time of making the said bond, continued and remained in the service aforesaid, and from thence departed and left her said service, as the said plaintiffs above alleged; and that the defendant *Margery Nainby* continued to inhabit, reside, and exercise her trade, in manner as the said plaintiffs by their plea alleged. But the defendant further said, that the said *Elizabeth* *within the space of half a mile from the dwelling-house of the said Margery*, in the said plea above mentioned, and within nine months after the departure of the said *Elizabeth* from the service aforesaid, did assist and instruct a certain person, viz. the said *David Chesman*, in managing and exercising the trade aforesaid, in the condition abovementioned, against the tenor of the said condition, to wit, in *Drury Lane* in the parish of *St. Giles* in the Fields. And on this issue was joined. At the trial, a verdict was found for the plaintiff in that action. The defendants moved the court of Common Pleas in arrest of judgment, upon the ground that the bond was void in law: but upon hearing counsel on both sides the court unanimously gave judgment for the said *Margery Nainby*; upon which the defendants brought a writ of error in the King's Bench, and upon argument in Hilary term 1726, the judgment was affirmed, by the unanimous opinion of all the judges of that court. The defendants then brought a writ of error in *Parliament*, to reverse both these judgments. But, after hearing counsel on this appeal, and the unanimous opinion of all the judges having been delivered, upon a point of law to them proposed, it was ordered and adjudged, that the judgment of affirmance given in the Court of King's Bench, affirming the judgment given in the Court of Common Pleas, should be affirmed.

So, in the case of *Davis v. Mason*, (*d*) where the condition of the bond was in consideration that the plaintiff would take the defendant as an assistant in his business as a surgeon, for so long a time as it should please the plaintiff, the defendant agreed not to practise on his own account for 14 years within ten miles of the place where the plaintiff lived; the bond was held good.

So, in the case of *Bunn v. Guy* (*e*) it was determined, that a contract entered into by a practising attorney to relinquish his business and recommend his clients to two other attorneys for a valuable consideration, and that he would not himself practise in such business within certain

(*d*) 5 Term Rep. 118. Vide *Clerke v. Comer*, Hardw. 53, and *Sloman v. Walter*, 1 Bro. Ch. C. 418. S. P. (*e*) 4 East Rep. 190.

limits, and would permit them to make use of his name in their firm, for a certain time, but without his interference, &c. was valid in law.

So, in the case of *Gale and others v. Reed*, (*f*) where by indenture between A. and B. and C. dissolving their partnership as rope makers, A. and B. covenanted to allow C. during his life, 2s. on every cwt. of cordage, which they should make on the recommendation of C. for any of his friends and connections, and whose debts should turn out to be good; and that A. and B. should stand the risk of such debts incurred, but should not be compelled to furnish goods to any of C.'s connections whom they should be disinclined to trust. And C. covenanted not to carry on the business of a rope maker during his life (except on government contracts) and that all debts contracted, or to be contracted in his or their names, pursuant to the indenture, should be the exclusive property of A. and B., and that C. should during his life exclusively employ A. and B. and no other person, to make all the cordage ordered of him by or for his friends and connexions, on the terms aforesaid, and should not employ any other person to make any cordage on any pretence whatsoever. It was determined, that the covenant by C. to employ A. and B. exclusively to make cordage for his friends, and not to employ any other, &c. A. and B. not being obliged to work for any other than such as they chose to trust, was not illegal and void, as being in restraint of trade without adequate consideration: for the whole indenture must be construed together, according to the apparent reasonable intent of the parties, and the general object being only to appropriate to A. and B. so much of C.'s private trade as they chose to give his friends credit for, so much only was covenanted to be transferred, and C. was still at liberty to work for any of his friends who were refused to be trusted by A. and B. by which construction the restraint on C. was only co-extensive, as in reason it could only be intended to be, with the benefit to A. and B.; and therefore the restraint on C. could be no prejudice to public trade.

(*f*) 8 East Rep. 80.

CHAPTER XI.

OF CONTRACTS AND AGREEMENTS FOR THE SALE AND RELINQUISHMENT OF OFFICES, &c.

THE buying or selling of public offices is rendered illegal by the statute 5 and 6 Ed. 6. c. 16. s. 2. and 3., by which it is declared, "that all bargains, sales, promises, bonds, agreements, covenants, and assurances for money, or other profit, in consideration of or relating to appointments, touching the administration of justice, or the collection of the revenue, &c. or for the deputation thereof, shall be void. And the provisions of this act were, by the stat. 49 Geo. 3. c. 126., extended to *Scotland* and *Ireland*, and to all offices in the gift of the crown, all commissions, civil, naval, and military, and all places and employments in the departments and offices therein particularly mentioned. But the 7th section of this statute contains a proviso that it shall not extend to any purchase or sale, or agreement for the purchase or sale of certain offices in the palace, or commissions in the army at the regulated prices, and authorized regimental agents acting without fee. And the statute does not prohibit a deputation to any office where it is lawful to appoint a deputy, or any agreement, &c. lawfully made in respect of any allowance, salary, or payment made, or agreed to be made, by or to such principal or deputy respectively, out of the fees or profits of such office. The 11th section also contains an exception as to annual payments out of the fees to any person formerly holding the office, provided such reservation, and the circumstances under which it was permitted, is stated in the instrument of appointment of the person succeeding to the office.

Upon the statute of Edward it has been determined, that an agreement to appoint a deputy to a public office upon the request of another, and to empower the latter to receive the fees of office, &c. to his own use, is void. Thus in the case of *Garforth v. Fearon*, (a) which was an

(a) 1 H. Bl. 527. Vide *Godolphin v. Tudor*, 1 Bro. P. C. 135. *Palmer v. Bate*, 2 Brod. & Bing. 673. S. P.

action of *assumpsit* for money had and received, brought by the direction of the Master of the Rolls, in consequence of a bill filed in equity, by the plaintiff and his son, praying that the defendant might be declared a trustee of the office of customer of *Carlisle*, for the plaintiff, for the benefit of the son. On the trial of the cause at the sittings in Trinity Term, 1787, before Lord *Loughborough* Ch. J. it appeared in evidence that application was made to the Lords of the Treasury by the friends of the plaintiff, to procure for the defendant the office of customer of the port of *Carlisle*. On the 25th of *February* 1773, the defendant signed the following declaration, "I do hereby declare, that my own name was made use of, in trust for Mr. *John Garforth*, on the application made to the Lords of the Treasury, for the office or place, lately held by Mr. *Grape*, deceased, in the county of *Cumberland*; and I do hereby promise, in case any appointment has been or is made thereof, that I will, upon request, appoint such deputy or deputies as he shall nominate, and also empower the said Mr. *Garforth* to receive the salary, stipend, wages, and fees of the said office to his own use."

On the 27th of *February* 1773, the defendant was appointed by patent to the office, and afterwards, on the nomination of the plaintiff, constituted deputies for *Carlisle*, *Whitehaven*, and *Workington*; but having received the profits, did not account for them to the plaintiff, in consequence of which the bill was filed. A verdict was found for the plaintiff, with leave to move the court to enter a nonsuit. A motion to this effect was accordingly made, and after argument at the bar, the court determined that the agreement was void. And Lord *Loughborough* Ch. J. said, "On full consideration of all the arguments used in this cause, I am of opinion that the transaction which is the foundation of the action is illegal, and the agreement void. This transaction concerns a public office, deemed by law to be a place of public trust, *prohibited to be sold*; and even the deputation of which, where such deputation may be made, cannot be an object of sale. The transaction is, that *Fearon* being appointed by the recommendation of *Garforth*, shall not interfere in the office, but shall appoint such deputies as *Garforth* shall nominate, and pay to him the profits. The effect of this is, that to all profitable purposes, and as to all the exercise of the office, except as to signing a receipt for the salary, *Garforth* is the real officer, but is not accountable for the due execution of it; he may enjoy it without being subject to the restraints imposed by law on such officers, for he does not appear as such officer; he may vote at elections, he may exercise inconsistent trades, he may act as a magistrate, in affairs concerning the revenue, he may sit in parliament, and will be safe if he remains undiscovered. If extortion be committed in the office by those appointed, the profits of that extortion redound to him, but he escapes a prosecution; for not being the active officer, he does not appear registered upon the records

of the Exchequer, and is not liable to the disabilities imposed by the statute on officers guilty of extortion, who are incapacitated to hold any office relating to the revenue. Whether a trust can be created in such an office, is for the consideration of the court in which the suit was originally brought: the only question in this court is, whether the agreement springing out of such a transaction can support an action? The written agreement of the 25th of *February* 1773, was for two purposes; one to appoint such deputies as the plaintiff should name; the other to pay over to him all the profits of the office. Though this case has been argued very fully and very ingeniously by the counsel on both sides, I do not recollect any argument used in support of the first promise, namely, to appoint at the nomination of another, deputies, for whom the person appointing is in point of law answerable, and whose places he is not allowed to sell or bargain for. The argument and doctrine laid down in the case of *Smith v. Coleshill*, 2 And. 55. which is similar to this, are that if one part of the agreement were bad, no action could be maintained on any other part which might be good. But it is not necessary to rest on this point, because I am of opinion that the agreement is bad in both parts. If it be without any consideration in a court of law, no action will lie upon it; it is but *nudum pactum*. What then is the consideration upon which this agreement proceeds? It is that *Fearon* is appointed on the application of *Garforth* in trust for him; this is the consideration. Now what is this but in plain terms this proposition; viz. that the public is abused, and the king deceived in the application? I should therefore not find much difficulty to conclude, if there were nothing more in the case, that the common law would not support an *assumpsit* on such an agreement. But I think it is clearly void by positive law respecting this office. The appointment of any customer by any means contrary to the stat. 12 Ric. 2. cap. 2. is a misdemeanor. That statute, though very antient, is certainly not obsolete; it is the statute under which they are sworn in the Exchequer. It not only prohibits the appointment, but goes on to say that 'none that pursueth by him or by others, privily or openly, to be in any manner of office shall be put in the same office, or in any other,' and the 5 & 6 Edw. 6. c. 16. makes void all promises, bonds, and assurances, as well on the part of the bargainer, as the bargainee. It is said, that this was *no sale of the office*, that no money has passed on the part of *Fearon* to obtain it. But the statute does not stop there. It is neither confined in its expressions nor its intent. In the case where a person obtaining an office gives money, the words of the act are extremely general, and according to their obvious construction without any enlargement, necessarily require that all bargains for money concerning those offices which are mentioned in the statute, are and shall be prohibited. Now is it not clear, that the plaintiff has bargained with the defendant? Would the

defendant have had the office without that bargain? The promise which is the ground of this action is, that the plaintiff shall have all the profits. By the words of the statute, any profit, however small, would have affected the transaction; but here there is a bargain for the whole. Courts of law have very properly considered this as a remedial statute, and have construed it liberally where the validity of such a transaction has been brought before them. The case of *Sir Arthur Ingram* (b) has been cited, and there it is clear that the transaction was not immoral; it was no otherwise wrong than as it was prohibited by a positive statute. It was a bargain between *Sir Edward Vernon* and *Sir Arthur Ingram* for a surrender of the office of cofferer of the household; on the surrender of *Vernon*, *Ingram* was appointed, and a bond given to account for the profits. This was holden to be within the statute, because he had charge of the King's money to pay the household. In that case the king was not deceived. The transaction was public and notorious, and the crown was disposed to have re-appointed the officer with a *non obstante*; but the question being referred to the Chancellor and twelve Judges, whether the king could by a *non obstante* give the right of receiving the appointment to *Ingram*: their opinion was, that the case was within the statute, and therefore that *Ingram* was disabled from taking the office, and could not by a *non obstante* be made capable of holding it. In the case of *Godolphin v. Tudor*, 6 Mod. 234. which is also in 2 Salk. 251. which was mentioned in the argument, the transaction was between the principal and the deputy, and the agreement was, that the deputy executing the office should pay to the principal out of the profits a certain sum. The court there held, where the agreement was to pay out of the profits, a certain proportion of the profits, it was not within the statute; and the reason given is very plain, and carries its own authority with it, namely, that the principal is entitled to all the perquisites and fees of the office, and the deputy to a recompence, as it were on a *quantum meruit* for the labour he has in the execution of it. All the effect, therefore, of such an agreement is, to ascertain the share which the deputy should have for the execution of the office. But it is remarkable with what strictness the courts have holden that proposition, and how careful they have been to guard against any transaction that might give any colour to the principal's receiving a gross sum out of the profits of an office executed by a deputy. For in this case, as it is reported in 6 Mod., the agreement was that *Tudor* should pay *Godolphin* 200*l.* a year, and it appeared upon record that the profits of the office amounted to 329*l.* 10*s.* every year in which it had been executed by *Tudor*, but as the stipulation was to pay 200*l.*

(b) Co. Lit. 234. a.

a year, absolutely without any reference to the profits of the office, the court thought themselves bound to give judgment for the defendant. Now that was a transaction perfectly fair; the mistake in stating the manner of the agreement was an innocent one, but the court would not permit the plaintiff to recover on an agreement where it was not stated on the agreement itself that the payment should be only of a portion of the profits, not an absolute one of the whole. Courts of Equity in setting aside securities supposed to be valid at law, have gone by the same rule, and have been just as careful not to permit by any construction, any breaches to be made in the provisions of the statute. The case of *Locknor v. Strode*, 2 Chan. Cas. 48. was quoted as a determination, where the court of Chancery held a looser rule with respect to giving a bond for the payment of a certain sum to the principal appointing a deputy. But that case is, as most of the others are in the same book, grossly misreported: no such determination was made, and both the state of the case and the decision are perfectly mistaken. I have a copy of it from Lord *Nottingham's* Notes, from which it appears that the defendant, being sheriff, made *John Lockner* his under sheriff, and the plaintiff who was the brother of *John Lockner*, gave a bond as a temporary security till the common security was given. *John* gave a bond in the usual form from an under sheriff to his principal for performance of the covenants in the indenture; but the first bond was not given up. *Strode*, after he was out of office arrested the plaintiff on it, who was obliged to give bail to Sir *Francis Rolle*, the succeeding sheriff in 600*l.*: and to be relieved was the object of the bill. The defendant pleaded a special agreement, that the bond was to secure him 400*l.* by quarterly payments for the under sheriff's place. This the plaintiff denied, and also insisted that such an agreement was illegal and contrary to the statute 23 Hen. 6. c. 9. The Chancellor being under doubts, a trial was directed, and the point reserved. So that no opinion was given by him on the validity of the transaction. The date of that case is also mistaken; it is stated in the report to have been *February* 9, 1680, but it was in fact in Hilary Term, 28 Car. 2. But in a subsequent case, Lord *Nottingham* very plainly intimated what would have been his opinion, if the agreement had been found good in law. That was the case of *Juxton v. Morris*, which is in the same book, and also misreported. By Lord *Nottingham's* Notes it appears that a bishop's registrar made a deputation of his office, rendering thereout 90*l.* *per annum*; the plaintiff exhibited a bill for an account, and the defendant pleaded that it was within the statute of 5 & 6 Ed. 6. and that there ought to be no account. It was answered, that this was only a reservation of part of the profits, and the principal being entitled to the whole, it was not illegal; which (says Lord *Nottingham*.) 'seemed specious.' But upon looking into the bill it charged an express

covenant to pay 90*l.* a year, without reference to the profits of the office. The plea was therefore allowed, and the bill dismissed. These cases connected show, that the opinion of the Court of Chancery at that time in considering how far these securities were liable to be avoided as contrary to the provisions of the statute was, that between principal and deputy there might be a reservation out of the profits, (though Lord *Nottingham* did not expressly so determine) but if otherwise, the security was clearly bad. In the case of *Law v. Law*, (c) Lord *Talbot* set aside a bond supposing it to be good in a court of law, the consideration of which differed very little from the present. On the part of the plaintiff, the case of *Bellamy v. Burrow* (d) was relied on as an authority to show that a court of equity will permit a trust to be created of an office clearly within the statute Ed. 6.; and on reading that case with attention, I admit it is a determination full to the point for which my brother *Adair* cited it; and undoubtedly as such a determination, it is of very considerable authority, both in respect to the learning and the known integrity of Lord *Talbot*. But it is fit to be observed, that in the same case there stands very fully delivered the opinion of Sir *Joseph Jekyll* to the contrary; and it rests upon an opposition between two very learned and upright men. Either opinion is probable, when there is such authority for its support. I will not enter into the consideration of that case, nor is it necessary to give an opinion here, whether a trust can in any instance be created in such an office. I do not take upon myself to say, without other consideration than the present circumstances can afford, that there is no possible case in which a trust fit to be executed may not be created in offices within the statute of Ed. 6. This is not a case of the execution of a trust, the cognizance of which is peculiar to a court of equity. Perhaps if the Master of the Rolls had fixed on *Fearon* the character of a trustee, a court of law might not think itself at liberty to question the authority of the determination. But the whole question for a court of law to determine is simply, whether there appears a good consideration on which an *assumpsit* can be supported? And I am of opinion, for the reasons I stated, both on the principles of the common law, and because the transaction is in defiance of the statutes which have been made to guard against evils of the same nature, that the consideration of the promise in this case is bad; that consequently it will not support an *assumpsit*, and therefore that a verdict must be entered for the defendant."

So, a promise to pay money in consideration of the relinquishment of a public office, in order that another might succeed to it, is void. Thus, in the case of *Parsons v. Thompson* (e), which was an action of *assumpsit* on a special agreement. Verdict for the plaintiff, subject to

(c) 3 P. Wms. 392.

(d) Talb. Rep. 97.

(e) 1 H. Bl. 322.

the opinion of the Court of Common Pleas on a case which stated in substance, that the plaintiff was, for thirty years, master-joiner of the dock-yard of *Chatham*, and the defendant foreman of the joiners. That the defendant having a prospect of succeeding to the office of master-joiner (which does not go in regular succession, but is in the appointment of the commissioners of the navy), applied to the plaintiff to procure himself to be superannuated, which he did, on the following written agreement being entered into by the defendant:—"Agreed on the 29th day of *March*, 1785, between Mr. *John Parsons*, master-joiner, of his Majesty's dock-yard at *Chatham*, and *John Thompson*, foreman of the joiners of the aforesaid place: In case I should succeed Mr. *Parsons* to be master-joiner of the said dock-yard, at the commencement of Mr. *Parson's* superannuation, then I do agree to allow him his extra pay from the yard-books, exclusive of his superannuation money, during his natural life, &c." The superannuation money was an annual allowance from government. In 1785 the defendant was appointed to the office. The bare pay of the master-joiner is half a crown *per* day, all above is extra pay. There are two sorts of extra pay; the tide extra, (when the men work by the tide beyond the common yard hours,) and the casual extra, which includes other extraordinary work. It is all denominated extra pay in the yard books without distinction. From 1785 to 1787 the defendant paid to the plaintiff the common tide extra, at the rate of 7½d. *per* tide for six winter months, and at 1s. 3d. for double tides, in the summer months, but not the casual extra, which the plaintiff did not demand. In the summer of 1787, the casual extra pay was much increased by the extraordinary work performed in fitting out ships on the prospect of an approaching war with the *Dutch*: this casual extra pay so increased, the plaintiff claimed by virtue of the agreement, but the defendant refused to account for to him; and in consequence this action was brought. The Court were of opinion, that no action could be maintained on the agreement. Lord *Loughborough* Ch. J. in delivering the opinion of the Court said, "Every action on promises must rest on a fair and valuable consideration, which it is for the plaintiff to make out. What is the consideration stated here? That the plaintiff represented himself as unfit for future service, and entitled to a pension for the past. This he did at the request of the defendant, on the promise from him of a certain allowance. Now the representation was either true or false. If true, there was no ground for any bargain with the defendant: the plaintiff did nothing for the defendant; all he did was for his own ease and advantage. If false, the public is deceived, the pension misapplied, and the service injured. It is not stated that the plaintiff procured the appointment for the defendant, (which would clearly have been brocage of office, and bad), but that he had made

way for the appointment. But from thence no valuable consideration can arise. Had the transaction passed with the knowledge of the admiralty, judging of the case, and applying at their discretion the allowance they are bound to make, possibly it might have stood fair with the public: I say possibly only; to be sure the ground of deceit on the public would be done away. But this case rests on a private unauthenticated agreement between the officers themselves, which cannot admit of any consideration sufficient to maintain an action. If it could be proved that it was to be measured by money, so as to form a valuable consideration, it must be in respect to the time when it was made, when the plaintiff was prevailed upon to retire in favour of the defendant. In this view it certainly would approach very near to brocage; it would differ very little, in effect, from selling the interest itself, though there would be a difference in the conduct of the party who in one case would be passive, in the other active. But his passive merit, if I may use the expression, would not avail him, where his active exertion would be a demerit. The case cited from 1 Vern. 98. I think may be supported. It was the purchase of a commission in the army, which the Duke of *Ormond* refused to ratify, on the ground, that the plaintiff had bought without the other party having leave to sell, who had not bought. I should rather suspect, from the usual inaccuracy of the cases in *Vernon*, that the plaintiff got the commission by succession, and set up this defence against the payment of the bond. There is something very like it in the reasoning of the court, who held there was no relief against the bond. The question of the consideration did not occur to them; and they seem to have holden that where commissions were generally saleable, there was nothing unfair in such a transaction. The next case in 2 Vern. 338. if true, is a decision undoubtedly contrary to what we now decide, and I think contrary to an evident principle of law. On the state of the report the bonds are directly and plainly given for brocage of an office of trust and profit, which is not an object of sale. I have therefore no difficulty to say, that I hold that case to be extremely ill-determined, if the note of it be at all correct. The case of *Ive v. Ash*, Prec. Chanc. 199. I think rightly determined; there was a purchase of a commission allowed to be sold, the commission was given up, and the purchaser wanted to get rid of the bargain, and be free from the agreement. He objected that a commission in the marines could not be sold; but it turned out upon examination, that the sale of such commissions was permitted, not being looked as within the statute. I therefore hold that case to be well adjudged: for the question whether an office is saleable or not, is a matter of public regulation, and not a question for a court. If by public regulation, right or wrong, certain offices are saleable, the Court cannot set aside the transaction for their sale, the Court is not to

make the regulation. Whether by the general police of the country an individual office is saleable or not, is not a matter of law. But in the present case there is no ground to say, that the defendant's office was sold under any regulation, or that the transaction between the parties was carried on under any authority, or with the consent of their superiors. This agreement resting on private contract and honour, may, perhaps, be fit to be executed by the parties, but can only be enforced by considerations which apply to their feelings, and is not the subject of an action. The law encourages no man to be unfaithful to his promise, but legal obligations are from their nature more circumscribed than moral duties.

So, a sale of the command of a ship, employed in the *East India* Company's service, by the owner thereof, without the knowledge of the company, is illegal; and the contract of sale cannot be the foundation of an action. (f)

So, if A., being a clerk, promises B., in consideration that B. will procure him to be rector of a donative church, with cure of souls, to pay 10*l.* to B., this is no good consideration to maintain an action, for this is simony, and an offence against the laws of *God* and man. (g) So, a promise to pay a *per centage* to procure for another a purchaser of his place in the customs is void. Thus, in the case of *Stackpole v. Earle*, (h) which was an action of *assumpsit*, wherein the plaintiff declared, that whereas the defendant before and at the time of making the promise aforementioned, and afterwards, was surveyor of the baggage of the port of *London*, and was greatly desirous of selling and disposing of his said place, and being so desirous to sell and dispose of the same, on the 1st of *January*, 1758, at *Westminster*, in the county of *Middlesex*, in consideration that the plaintiff, at the defendant's request, would use his endeavour to procure, and would procure a proper person to purchase the said place of the defendant, he undertook and promised to pay the plaintiff 2*l.* for every 100*l.* that such person should give for the purchase of the said place; and the plaintiff avers that confiding in the said defendant's promise and undertaking, afterwards on the same day and year at *Westminster* aforesaid, he, at the defendant's request, used his endeavours to procure, and by means thereof on the 1st of *March*, 1758, at *Westminster*, procured one *John Gunston*, being a proper person, to purchase of the defendant the said place for 1200*l.*, and that the said *Gunston* did give to the defendant 1200*l.* for the purchase of the said place, whereby the defendant became liable to pay to the plaintiff 24*l.* for the purchase of the said place. There were also general counts for work and labour done, &c. Upon the debating this case at the bar, it

(f) *Blachford v. Preston*, 8 Term Rep. 89.

(g) Rol. Abr. 18. pl. 13. Cro. Car. 337. 353. 361. Sir W. Jones's Rep. 341.

(h) 2 Wils. 133.

was urged by the counsel for the plaintiff, that he was neither a buyer or seller of the place or office, and that what he had done was at the defendant's request, and was neither *malum in se*, nor *malum prohibitum*, and therefore he ought to be satisfied for his labour and trouble; but the whole Court were of opinion, that it was *malum prohibitum*, and within the statute of 5 & 6 Ed. 6. cap. 16. sec. 2. And though the plaintiff himself was neither buyer or seller, yet this appears to be a promise to pay him money, to the intent that a person should have an office belonging to the customs, which is within the very words of the statute; but Mr. Justice *Clive* said, he thought the selling of offices was *malum in se* at common law, and that if the statute had never been made, he thought the procuring a person to buy the office of the defendant was not a good consideration in law to raise an *assumpsit*, (which was not denied by any of the judges,) because it was illegal; as if a gaoler permits a prisoner to go at large upon his promising to satisfy the debt for which he is imprisoned, he escapes by the consent of the gaoler, and does not pay the debt according to his promise, the gaoler brings an *assumpsit*, but shall not recover, because the consideration was illegal; for it is a most certain principle, that every consideration to ground an *assumpsit* upon must be lawful.

But a promise by one of two candidates for the office of under-sheriff, in consideration that the other will desist, is good. Thus, in the case of *Parker v. Brown*, (i) which was an action of *assumpsit*, whereas the plaintiff was suitor to the sheriff of *Middlesex*, to obtain the office of under-sheriff for such a year, and to be made under-sheriff for the same year, and was very likely to obtain the said place; for which the defendant also, at the same time, was a suitor; that the defendant, in consideration the plaintiff would desist his suit, promised to the plaintiff if he obtained the said office, and was made under-sheriff, to pay to the plaintiff 20*l.* for such a gelding, which the plaintiff had delivered to him: and allegeth *in facto*, that he delivered to the defendant the said gelding; and that the defendant was made under-sheriff, and executed the office for the said year; and that he had not paid, &c. Upon *non assumpsit* pleaded, and verdict found for the plaintiff, judgment was given in the Common Pleas for the plaintiff; but a writ of error was brought in the King's Bench: and the error insisted upon was, that this is no lawful nor valuable consideration. But all the Court held, "That the consideration was good and valuable; for by this means the plaintiff desisted from his suit, and the defendant obtained the said office." Wherefore the judgment was affirmed.

(i) Cro. Jac. 612.

CHAPTER XII.

OF CONTRACTS TO MARRY, OR IN RESTRAINT OF MARRIAGE: AND OF AGREEMENTS TO PAY MONEY IN CONSIDERATION OF MARRIAGE: AND OF THE STATUTE OF FRAUDS RELATING THERETO.

1. **O**F CONTRACTS TO MARRY.] — If a man and woman being unmarried mutually promise to marry each other, but afterwards the man marries another woman, an action of *assumpsit* will lie, in which the woman shall recover damages for breach of such a contract; for though matrimonial causes are regularly cognisable in the spiritual court, yet the contract in such case being executory, and revoked by the subsequent marriage, could not be enforced in that court as a contract *in presenti* may; and marriage being an advantage, and the loss of it a temporal loss, it is fit that there should be a remedy in the temporal courts, otherwise there would be a failure of justice. (a) And therefore, in the case of *Rutter v. Hebden*, (b) which was an action of *assumpsit* in consideration that the plaintiff would marry the defendant, he promised to marry her: after verdict for the plaintiff, it was moved that this was a matter ecclesiastical upon which no action at law would lie. But the Court would not permit it to be argued, and gave judgment for the plaintiff.

So, in the case of *Harrison v. Cage* and wife, (c) which was also an action of *assumpsit* on a special promise of the woman before marriage, “that in consideration that the plaintiff being a bachelor had on such a day and place promised to take her (whilst sole) to wife, she, whilst she was sole, &c., promised the plaintiff to take him for her husband:” then he averred in fact, that he had tendered himself to marry her, and had requested her to marry him, but that she refused, and afterwards married the defendant. The cause was tried, and a verdict was found for the plaintiff, damages 400*l.*, the woman being worth 3000*l.* when the plaintiff courted her, and afterwards by the death of her brother worth double

(a) Bac. Abr. tit. Assumpsit, A.

(c) Carth. 467. 1 Ld. Raym. 386. S.C.

(b) 1 Lev. 147. 1 Sid. 180. S.C.

that sum. It was moved in arrest of judgment, that this action would not lie upon the promise of marriage made by the woman; for the law doth not intend that the man is advanced by marriage; and therefore such a promise of marriage to him is of no consideration in law, and by consequence, no action can be founded thereon. But it is otherwise where a man promiseth to marry a woman, because in the eye of the law marriage is an advancement to the woman. It was also contended that this promise was void for uncertainty, for there was no certain time agreed on when the marriage should take effect. To which it was answered, and so resolved, *per curiam*, "That here were reciprocal promises; and therefore as her promise to him was a good consideration to make his promise obligatory, so by the same reason his promise to her was a sufficient consideration to make her promise binding in this case as well as in any other mutual agreements." And the Court did not allow that distinction between the advancement of a man and of a woman in marriage; and that this was a good promise, though the certain time of marriage was not agreed on, especially since the plaintiff averred, that he had offered to marry her, and that she refused, which in this case was necessary to be done, to entitle the plaintiff to this action. So, in the case of *Hutton v. Mansell*, (d) an action of *assumpsit* was brought, laying mutual promises of marriage between the plaintiff and the defendant, and a refusal on the part of the man, who was the defendant. And upon evidence an express promise was proved to have been made by the man, but none by the woman. And *per Holt* Ch. J. "If there be an express promise by the man, and it appear the woman countenanced it, and by her actions at the time behaved herself so as if she agreed to the matter, though there be no actual promise, yet that shall be sufficient evidence of a promise of her side. And he said, he remembered a case in which he had been counsel, in Lord Chief Baron *Montague's* time, where it had been so ruled upon evidence against his client; and being then dissatisfied therewith, he put the case to eminent men of those times, who all concurred in opinion with the Chief Baron."

So, if an infant and a person of full age mutually promise to intermarry, the infant, although not bound by her promise, may, notwithstanding, maintain an action for breach of promise by the adult. Thus, in case of *Holt v. Ward*, (e) the declaration stated, that it was mutually agreed between the plaintiff and defendant, that they should marry at a future day, which is past; and that in consideration of each other's promises, each engaged to the other: notwithstanding which the defendant did not marry the plaintiff, but had married another, which she laid to her damage of 4000*l*. The defendant pleaded *non assumpsit*, and that the plaintiff, at the time of the promise, was an infant of fifteen years of

(d) 6 Mod. 172. 3 Salk. 16. 8.C.

(e) 2 Stra. 937. Fitzg. 275.

age. At the trial thereof a verdict was found for the plaintiff, with 200*l.* damages. But to the plea of infancy, the plaintiff demurred; and the case was several times argued at the bar; and the Court appointed an argument by Civilians, to see what their law would determine in such a case. Upon the argument of the Civilians, no instance could be shown wherein they had compelled the performance of a minor's contract. And they who argued for the defendant strongly insisted, that in the case of a contract *per verba de futuro* (as this was) there was no remedy, even against a person of full age, in the spiritual court; but only an admonition. And the only reason why they hold jurisdiction in the case of a contract *per verba de præsenti* is, because that is looked upon amongst them to be *ipsum matrimonium*, and they only decree the formality of a solemnization in the face of the church.

Raymond Ch. J. afterwards delivered the resolution of the Court as follows: "The objection in this case is, that the plaintiff, not being bound equally with the defendant, this is *nudum pactum*, and the defendant cannot be charged in this action. Formerly it was made a doubt by my Lord *Vaughan*, (*f*) whether any action could be maintained on mutual promises to marry; but that is now a point not to be disputed. And as to the present case, we should have had no difficulty in giving judgment for the plaintiff, if we could have been satisfied by the arguments of the Civilians, that as the plaintiff was of the age of consent, any remedy, though not by way of action for damages, could be had against her. But since they seem to have had no precedent in the case, we must consider it upon the foot of the common law. And upon that the single question is, whether this contract, as against the plaintiff, was absolutely void. And we are all of opinion, that this contract is not void, but only voidable at the election of the infant; and as to the person of full age it absolutely binds."

2. OF CONTRACTS IN RESTRAINT OF MARRIAGE.] — A promise by a man to pay to a woman a sum of money if he shall marry any body else is considered as a restraint of marriage, and therefore void. Thus, in the case of *Lowe v. Peers*, (*g*) which was an action of covenant upon a marriage contract; being a promise under the defendant's hand and seal in the following words: "I do hereby promise Mrs. *Catherine Lowe*, that I will not marry with any one person besides herself; if I do, I agree to pay the said *Catherine Lowe* 1000*l.*, within three months, &c." At the trial, the plaintiff obtained a verdict for the 1000*l.* But it was afterwards moved, in arrest of judgment, that this contract was not valid in law; and of this opinion was the Court, and the judgment was accordingly arrested. Lord *Mansfield* Ch. J. said, "All these contracts ought to be looked upon with a jealous eye, even supposing them clear

(*f*) *Carter*, 233.

(*g*) 4 *Burr.* 2225.

of any direct fraud. And they should be determined on public and general considerations: engagements of this description are liable to many mischiefs, and to many dangerous consequences. When persons of different sexes, attached to each other, and thus contracting to marry each other, do not marry immediately, there is always some reason or other against it; as disapprobation of friends and relations, inequality of circumstances, or the like. Both sides ought to continue free: otherwise such contracts may be greatly abused; as by putting women's virtue in danger, by too much confidence in men, or by young men living with women without being married. Therefore these contracts are not to be extended by implication." And *Yates* Just. said, "This agreement is in restraint of marriage. It is not a covenant 'to marry the plaintiff; but not to marry any one else.' And yet she was under no obligation to marry him. So that it restrained him from marrying at all, in case she had chosen not to permit him to marry her."

So, in the case of *Hartley v. Rice*, (*h*) which was an action upon a wagering contract for 50 guineas, that the plaintiff would not marry within six years: this was held to be *prima facie* in restraint of marriage, and therefore void; no circumstance appearing to show that such restraint was prudent and proper in the particular case.

3. OF AGREEMENTS TO PAY MONEY IN CONSIDERATION OF MARRIAGE; AND OF THE STATUTE OF FRAUDS RELATING THERETO.] — In one part of the fourth clause of the statute of frauds 29 Car. 2. c. 3. it is enacted, "that no action shall be brought whereby to charge any person upon any agreement made upon consideration of marriage, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised."

Very soon after the passing of the act it was holden, that this branch of it extended as well to mutual promises to marry, as to an agreement in consideration of marriage. Thus, in the case of *Philpott v. Waller*, (*i*) which was an action of *assumpsit*, in consideration that the plaintiff, at the request of the defendant, would consent to take him to be her husband, the defendant promised to take her to be his wife; and that the plaintiff was ready, and offered to take the defendant to be her husband, but he refused. This promise was made without any writing; it was therefore contended that it was void by the statute; but it was answered, that this was no promise within the statute, which was only intended of promises for payment of money upon marriages, and not of promises to marry. But the Court resolved, that this promise is directly within the words, and not out of the intent of the statute; because the pro-

(*h*) 10 East Rep. 22.

(*i*) 3 Lev. 65.

mises is, that in consideration the one would marry the other, the other would marry him, and therefore it is a promise in consideration of marriage.

This construction of the statute, however, was afterwards much doubted, and in some cases denied; (*k*) but it was at last finally settled, that mutual promises to marry need not be in writing by the statute of frauds. Thus, in the case of *Cork v. Baker*, (*l*) the plaintiff declared, that in consideration she promised to marry the defendant, he promised to marry her at his father's death, who was since dead; but the defendant refused so to do, and had afterwards married A. B. It was objected, that this being a *parol* promise was not good in law. But, after argument, it was held, that this was not within the statute of frauds and perjuries, which relates only to contracts in consideration of marriage.

A *parol* agreement to pay money, or make a settlement in consideration of marriage, if not reduced into writing previous to the marriage, is void; and a subsequent marriage is not a part execution of such an agreement to take it out of the statute. But a subsequent marriage and settlement has been held sufficient to prevent the statute operating upon such *parol* promise. (*m*)

So, where A. by letter promises to give such a fortune with his daughter to B., and B. marries the daughter on the encouragement of this letter; this is sufficient to bring the agreement out of the statute of frauds; and B. shall recover, because the agreement is executed on his part as far as it can be, and can never be undone after. (*n*)

Letters from parents, or persons *in loco parentis*, containing promises of provisions, have been a frequent subject of adjudication; and wherever they have been explicit in their terms, and the subject-matter of the promise has been reduced to sufficient certainty, they have been held to satisfy the statute. Thus, in a case determined a very few years after the statute was passed, where a father wrote a letter, signifying his assent to the marriage of his daughter with J. S., and that he would give her 1500*l.*, and afterwards, by another letter, upon a further treaty concerning the said marriage, went back from the proposals of his first letter; and again, at some time after, declared that he would agree to what was proposed in his first letter; the letter was held a sufficient promise in writing, within the statute of frauds, and that the last declaration had set up the terms of the first letter again. (*o*)

And an action of *assumpsit* will lie upon a contract or promise to pay money in consideration of marriage. Thus, in the case of *Robert Browne*

(*k*) Vide Lord Raym. 387.

(*l*) Stra. 34.

(*m*) *Montacute v. Maxwell*, 1 P. Wms. 618. Stra. 236. S. C. See also 1 Ves. jun. 199. 4 East 201.

(*n*) 2 Eq. Cas. abr. 49. See also 2 Vern. 322. 1 Ves. 297.

(*o*) Vide 2 Vent. 361. Prec. Chan. 560. 2 Vern. 200. 202.

and wife v. *Garborough*, (o) which was an action of *assumpsit*, upon a promise made to the *feme dum sola fuit*: the declaration stated, that whereas a communication was between *J. Browne*, father of the plaintiff *Robert*, and the defendant, cousin of the said *Robert Browne*, and the said *feme*, when she was sole, of a marriage to be had between the said plaintiffs; and the said *John Browne* promised to the *feme*, that if the marriage did take effect, that he would assure to them such land, &c.; and the defendant did then promise to her, that if *J. Browne* did not perform his promise, the defendant would give her 100*l.*, and alleges that the marriage did take effect, and the lands were not assured, &c. upon *non assumpsit*, it was found for the plaintiff. But it was moved in arrest of judgment, that there was no sufficient consideration to ground the promise; for the *feme* was a mere stranger to the defendant, and there was no reason for him to give her 100*l.* in marriage. But it was answered, that there was a good consideration; for it was alleged, that the defendant was kinsman to *Robert Browne*, the plaintiff; and it is to be intended that by reason of these words she was induced to marry *R. Browne*, which otherwise she would not have done; and they directed judgment to be entered for the plaintiffs: and upon a writ of error brought, the judgment was affirmed: for, peradventure, she trusted the defendant rather than *J. Browne*, and the defendant was cousin to the said *R. Browne*, the plaintiff.

So, if B., the daughter of A., be heir apparent to C., and D. promises to A., the mother, in consideration that she would consent and agree that the said B., her daughter, should marry his son, that he would give to the said A. 100*l.*, upon which A. consents, and the marriage takes effect: this is a good consideration; for nature has given the power of disposing to parents, and in nature their children are bound to obey them. (p) So, if A., in consideration that B. will marry his daughter, assumes and promises to give to B. 20*l.*, and give to him twenty French pieces: this is a good promise: for this, according to our usual speech, shall be intended French crowns, which are the common coin of *France*, and here known. (q)

So, if B. promises A., in consideration of marriage between A. and C., the daughter of B., that he will pay to A. 100*l.* at a time after, and in the mean time to pay according to the rate of 8*l.* for the interest thereof; this is a good consideration: the promise being upon a marriage, and not for money lent. (r) So, if a man promises another, in consideration that he will marry his daughter, to give him as much as he hath given or should give with any of his other daughters, if after he gives such a

(o) Cro. Eliz. 65. Note, *indebitatus assumpsit* will not lie for money payable in consideration of marriage; it must be on the special promise. Vent. 268.

(p) Mo. 396. pl. 808. 857. pl. 1176.

Hob. 10. Brownl. 18. Hutt. 59. 1 Dan. Abr. 47. 1 Vin. Abr. 303.

(q) *Poynter v. Poynter*, Cro. Car. 194.

(r) 1 Vin. Abr. 297. pl. 15. 2 Sid. 116. S. P.

sum with another of his daughters, and dies, an action upon this *assumpsit* lies against the administrator notwithstanding it be collateral. (s)

In *Marsh and Rainsford's* case (t) there was a communication of marriage between M. and the daughter of R., and of 200*l.* to be given with the daughter, but they could not agree on the day of payment. *Marsh* stole away the daughter, and married her without the knowledge or consent of the father; but afterwards R. agreed and promised that in consideration he had married his daughter he would give him 200*l.*, and afterwards M. brought an action of *assumpsit*, and recovered that sum. So, in another like action of *assumpsit*, (u) brought upon a promise of 20*l.* made to the plaintiff by the defendant in consideration that the plaintiff, at the special instance of the said defendant, had taken to wife the cousin of the defendant; that was good cause, although the marriage was executed and passed before the undertaking and promise, because the marriage ensued the request of the defendant. But in the case of *Sandhill v. Jenny*, (v) where the plaintiff declared, that in consideration that the plaintiff had formerly married his daughter at his special instance and request, the defendant promised the plaintiff to pay him every year, during the life of the defendant, 10*l.*, &c. The plaintiff, upon *non assumpsit* pleaded, had judgment; but upon a writ of error in the Exchequer chamber the judgment was reversed, because the marriage was executed before the promise made, yet the declaration supposes that the defendant requested the plaintiff to the marriage.

So, if there be a discourse between the father of A. and B., in relation to a marriage between the said A. and the daughter of B., and B. then affirms and publishes to the father of A. *quod daret ei qui maritaret* his said daughter with his consent 100*l.*, and after A. marries the daughter of B. with his consent; yet this affirmance and publication of B. shall raise no promise upon which an action may be brought, because these words do not include any promise. (w)

(s) 1 Vin. Abr. 287. pl. 3. See also 3 Bulst. 235. 248. 1 Rol. Rep. 193. 435. pl. 29. Poph. 148. 2 Roll. Rep. 104. Cro. Jac. 417.

(t) 2 Leon. 111. Cro. Eliz. 59. Dy. 272. b. in marg. 3 Lev. 566.

(u) Dyer, 272. b. pl. 32.

(v) Ibid. 272. b. in marg.

(w) 1 Rol. Abr. 6. l. 40. Yel. 17. Noy. 11. 1 Dan. Abr. 26.

THE LAW

OF

CONTRACTS AND PROMISES.

PART THE THIRD.

**OF CONTRACTS AND PROMISES BY AND BETWEEN
PARTICULAR PERSONS.**

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PART THE THIRD.

CHAPTER I.

OF CONTRACTS BY AND BETWEEN PARTNERS ; AND WHO MAY BE DEEMED A PARTNER, AND MADE LIABLE TO PARTNERSHIP DEBTS AND CONTRACTS.

A PARTNERSHIP is a contract or agreement between two or more persons, to enter into and carry on some lawful trade or business, or other adventure, on their joint account and risk ; and in which money, skill, and labour are to be employed ; and the profit or loss divided between them either in just proportions, according to their respective shares and interests, or as may be agreed upon. The legislature has, in a few instances, and by particular acts of parliament, limited the number of persons who may associate themselves together in partnership, namely, in the businesses of bankers, (a) and of coal merchants. (b) So, in marine insurances, and in lending of money on bottomree, an act of parliament passed in the reign of George the first, (c) wholly prohibiting private partnerships in these concerns. No other restraint, however, is put upon joint adventures, excepting those schemes which have a mischievous tendency to delude and aggrieve the unwary public ; as was the case with the infamous South Sea bubble. Indeed we find that in the early part of the reign of George the first, these schemes and devices had come to such a height, as to call for legislative interference ; and accordingly, by the statute 6 Geo. I. c. 18., after reciting the mischievous consequences of such projects, it is enacted, “ that such undertakings and attempts as are described in the act, and all other public undertakings and attempts tending to the common grievance of his Majesty’s subjects, or great numbers of them, in their trade, commerce, or other lawful affairs, and all public subscriptions, and other matters in furtherance of such objects, and more particularly acting as a corporate body raising transferable stock, shall be illegal and void ; with a proviso, that the act shall not operate to prevent the carrying on partnerships as theretofore legally done.”

When a partnership is legally formed, all the members of the firm are liable to those with whom they, or any of them, may contract respecting the

(a) Vide stats. 6 Anne c. 22. s. 9. 15
Geo. 2. s. 13. s. 5.

(b) 28 Geo. 3. c. 53. s. 1.
(c) Chap. 18. s. 12.

joint concern; and consequently secret or dormant partners, when known, are equally liable to third persons; and they cannot excuse themselves by any private stipulation or agreement with each other: for we shall find it laid down as a general rule, throughout all the cases on this subject, that all who participate in the profits shall be deemed partners, and liable to those who give credit to the firm: we shall also see, that a person may be made liable to partnership debts and contracts, if he participates in the profits, though by private agreement he is not to share in the loss; and even though, as between himself and the firm, he may not, in point of fact, be a partner; for an agreement to share profits alone cannot prevent the legal consequence of also sharing losses, for the benefit of creditors. Perhaps it may be difficult to find an exact definition of a partnership; but it has been always holden, with some few exceptions, that where there is a share of profits, there shall also be a share of losses; for whoever takes a part of the capital, or of the profits of it, takes a part of that fund to which the public have given credit, and to which they look for payment. If there be no original capital, the profits of the trade are themselves a capital, to which the creditor is to have recourse. (c) There are indeed cases in which a man, who is neither a partner in fact, nor participates in profit or loss, may render himself liable as such, and be fixed with partnership contracts, by his own improper conduct, either by allowing his name to be used as one of the firm, or by representing himself to be a partner; for the public, who deal with a firm, and know nothing of the private arrangement between the parties engaged in the business, but who give credit to outward appearances, and to the conduct of those who are actively engaged and appear to be jointly concerned, and who by their interference and conduct induce others to deal with and treat them as partners, ought not afterwards, when the creditor comes to demand payment from all of them, to be turned round and told that some of the parties were not in partnership. If, indeed, the law did not make them all jointly liable as partners, it would be permitting persons to hold out to the public false colours to a very mischievous extent. (d)

When once a person is fixed as a partner, it may be taken as a general rule, that he, and those who are acting with him, are liable not only for the joint acts of all, but also the separate acts of each, so far as they regard the particular trade or concern in which they are so jointly engaged: and one partner may pledge the credit of himself and co-partners to any amount. It was therefore very truly said by Lord *Kenyon*, in the case of *Wells v. Masterman*, (e) "That when a man enters into partnership he certainly commits his dearest rights to the discretion of every one who forms a part of that partnership in which he engages." And in the

(c) Vide 2 H. Bl. 246. & 2 Sir William Black. 1000.

(d) Vide 2 H. Bl. 246. & 1 Esp. Rep. 29.

(e) 2 Esp. Rep. 731.

case of *Baker v. Charlton*, (e) his lordship observed, "It is an imprudent thing for a man to enter into partnership with any person, unless he has the most implicit confidence in his integrity; for I remember," said his lordship, "Lord *Mansfield* mentioning a case where a gentleman of great fortune had lent a sum of money to a house and was to receive interest according to the profits of the business; he had no idea at the time that this constituted him a partner, but it was so determined, and he was absolutely ruined, though he never intermeddled in the management of the business." And in the case of *Crawshay v. Maule*, (f) the Lord Chancellor *Eldon* said, "If men will enter into a partnership, as into a marriage, for better and for worse, they must abide by it."

These liabilities will be more fully considered, as well as the general subject of this chapter, under the following heads, namely,

1. WHAT AGREEMENT, STIPULATION, OR OTHER ACT, WILL CONSTITUTE A PARTNERSHIP OR JOINT DEALING, SO AS TO RENDER A PERSON LIABLE AS A PARTNER UPON CONTRACTS MADE WITH THE FIRM.
2. OF THE LIABILITY OF PARTNERS UPON CONTRACTS, &c. MADE BY ALL OR ANY OF THEM DURING THE PARTNERSHIP.
3. OF A CHANGE OR DISSOLUTION OF A PARTNERSHIP, AND THE LIABILITY OF A RETIRING PARTNER, EITHER FOR WANT OF PROPER NOTICE OR BY SUFFERING HIS NAME TO BE USED, &c.
4. OF THE PAYMENT OF DEBTS AFTER A DISSOLUTION OF PARTNERSHIP; AND OF THE APPLICATION OF SUCH PAYMENTS.
5. HOW PARTNERS MUST SUE OR BE SUED DURING THEIR PARTNERSHIP, AND AFTER THE DISSOLUTION OF THE PARTNERSHIP BY DEATH OR BANKRUPTCY.
6. OF THE RIGHT OF SET-OFF OF MUTUAL DEBTS.
7. OF CONTRACTS AND PROMISES BY PARTNERS *INTER SE*.

(e) Peakc, 74.

(f) 1 Swans. Rep 509.

I. WHAT AGREEMENT, STIPULATION, OR OTHER ACT, WILL CONSTITUTE A PARTNERSHIP OR JOINT DEALING, SO AS TO RENDER A PERSON LIABLE AS A PARTNER UPON CONTRACTS MADE WITH THE FIRM.

1. BY A PARTICIPATION OF PROFITS, WHETHER IN THE SHAPE OF COMMISSION, INTEREST, OR ANNUITY, &c.] In order to constitute a partnership, and to make a person liable as a partner, there must, in general, be some agreement to share in the profits of a trade or particular concern. Thus, in the case of *Waugh v. Carver* and others, (g) which was an action of *assumpsit* for goods sold and delivered, and for work and labour done, &c. And where a verdict was found for plaintiff, subject to the opinion of the court, on a case which stated, That on the 24th February, 1790, articles of agreement were duly executed between *Erasmus Carver* and *William Carver* (two of the defendants) of the one part, and *Archibald Giesler* (the other defendant) of the other part, reciting, "Whereas the said *Archibald Giesler*, some time since, received appointments from several of the principal ship-owners, merchants and insurers in *Holland*, and other places, to act as their agent in the several counties of *Hampshire*, *Devonshire*, *Dorsetshire*, and *Cornwall*; and whereas the said *Erasmus Carver* and *William Carver* have, for a great number of years, been established at *Gosport* in the agency line, under the firm of *Erasmus Carver* and *Son*, and hold sundry appointments as consuls and agents for the *Danish* and other foreign nations, and also have very extensive connections in *Holland*, and other parts of *Europe*; and whereas it is deemed for their mutual interest, and the advantage of their friends, that the said *Archibald Giesler* should remove from *Plymouth*, and establish himself at *Cowes* in the *Isle of Wight*; and they had agreed, that each should allow to the other certain portions of each other's commissions and profits, that is to say, the said *Archibald Giesler* doth covenant, promise, and agree to pay or allow to the said *Erasmus Carver* and *William Carver*, one full moiety or half part of the commission agency, to be received on all such ships or vessels, as may arrive or put into the port of *Cowes*, and likewise one full moiety or half part of the discount on the bills of the several tradesmen employed in the repairs of such ships or vessels. And the said *Erasmus Carver* and *William Carver* to pay or allow to the said *Archibald Giesler*, his executors, administrators, or assigns, three-fifth parts or shares of the commission or agency to be received by the said *Erasmus Carver* and *William*, on account of all ships and vessels, the commanders whereof may in consequence of the endeavours, interference, or influence of the said *Archibald Giesler*, proceed from

(g) 2 H. Bl. 235.

Cowes to Portsmouth, and there put themselves under the direction of the said Erasmus Carver and William Carver, in manner hereinbefore mentioned, and likewise one and one-half per cent. on the amount of the bills of the several tradesmen employed in the repairs of such ships or vessels, together with one-fourth part of such sum or sums as may be charged or brought into account for warehouse-rent, on the cargoes of such ships or vessels respectively; and also one-sixth part of such sum or sums as may be charged or brought into account, for warehouse-rent on the cargoes of ships or vessels as may be landed at Cowes aforesaid. And also that they, the said Erasmus Carver and William Carver, their executors, administrators, or assigns, shall and will, well and truly, pay or allow, or cause to be paid and allowed, unto the said Archibald Giesler, his executors, administrators, or assigns, one fourth part or share of the commission or agency to be received by the said Erasmus Carver and William Carver, on account of all such ships or vessels that may arrive or put into the port of Portsmouth, or remain in the limits thereof, under the care and direction of the said Erasmus Carver and William Carver; and likewise one-half per cent. on the amount of the bills of the several tradesmen employed in the repairs of such ships or vessels. And it is hereby likewise covenanted, that each party shall separately run the risque of, and sustain all such loss and losses, as may happen on the advance of monies, in respect of any ships or vessels, under the immediate care of either of the said parties respectively.

In pursuance of these articles *Giesler* removed from *Plymouth*, and settled at *Cowes*, where he carried on the business of a ship-agent, in his own name, and contracted for the goods, &c. which were the subject of the action. And the question was, whether the defendants were partners on the true construction of the articles? The case was argued twice at the bar: and the Court, after taking time to consider of their judgment, determined that the defendants were partners; and consequently jointly liable for the debt in question. And Lord Chief Justice *Eyre* said: "The discussion of this case has enabled me to make up my mind, and removed the only difficulty I felt, which was, whether by construing this to be a partnership, we should not determine, that if there was an annuity granted out of a banking-house, to the widow, for instance, of a deceased partner, it would make her liable to the debts of the house, and involve her in a bankruptcy. But I think this case will not lead to that consequence. If the question were between A. and B. whether they were partners or not, it would be very well to inquire whether they had contributed, and in what proportions, stock or labour, and on what agreement they were to divide the profits of that contribution. But in all these cases, a very different question arises. The question is generally, not between the parties, as to what shares they shall divide,

but respecting creditors, claiming a satisfaction out of the funds of a particular house, who shall be deemed liable in regard to these funds? Now a case may be stated, in which it is the clear sense of the parties to the contract, that they shall not be partners; that A. is to contribute neither labour nor money, and to go still farther, not to receive any profits. But if he will lend his name as a partner, he becomes as against all the rest of the world, a partner, not upon the ground of the real transaction between them, but upon principles of general policy, to prevent the frauds to which creditors would be liable, if they were to suppose that they lent their money upon the apparent credit of three or four persons, when in fact they lent it only to two of them, to whom, without the others, they would have lent nothing. The argument gone into, however proper for the discussion of the question, is irrelevant to a great part of the case. Whether these persons were to interfere more or less, with their advice and directions, and many small parts of the agreement, I lay entirely out of the case; because it is plain upon the construction of the agreement, if it be construed only between the *Carvers* and *Giesler*, that they were not, nor ever meant to be partners. They meant each house to carry on trade without risque of each other, and to be at their own loss. Though there was a certain degree of control at one house, it was without an idea that either was to be involved in the consequences of the failure of the other, and without understanding themselves responsible for any circumstances that might happen to the loss of either. That was the agreement between themselves. But the question is, whether they have not, by parts of their agreement, constituted themselves partners in respect to other persons. The case therefore is reduced to the single point, whether the *Carvers* did not entitle themselves, and did not mean to take a moiety of the profits of *Giesler's* house, generally and indefinitely as they should arise, at certain times agreed upon for the settlement of their accounts. That they have so done, is clear upon the face of the agreement: and upon the authority of *Grace v. Smith*, (h) he who takes a moiety of all the profits indefinitely, shall, by operation of law, be made liable to losses, if losses arise, upon the principle that by taking a part of the profits, he takes from the creditors a part of that fund which is the proper security to them for the payment of their debts. That was the foundation of the decision in *Grace v. Smith*, and I think it stands upon the fair ground of reason. I cannot agree that this was a mere agency, in the sense contended for on the part of the defendants, for there was a risque of profit and loss: a ship-agent employs tradesmen to furnish necessaries for the ship, he contracts with them, and is liable to them, he also makes out their bills in such a way as to determine the charge of commission to the ship

(h) Post, 469.

owners. With respect to the commission, indeed, he may be considered as a mere agent, but as to the agency itself, he is as much a trader as any other man, and there is as much risque of profit and loss, to the person with whom he contracts, in the transactions with him, as with any other trader. It is true he will gain nothing but his discount, but that is a profit in the trade, and there may be losses to him, as well as to the owners. If therefore the principle be true, that he who takes the general profits of a partnership, must of necessity be made liable to the losses, in order that he may stand in a just situation, with regard to the creditors of the house, then this is a case clear of all difficulty. For though with respect to each other, these persons were not to be considered as partners, yet they have made themselves such, with regard to their transactions with the rest of the world. I am therefore of opinion that there ought to be judgment for the plaintiff."

So, in the case of *Bloxam and Fourdrinier v. Pell and Brooke*, (i) where it appeared there was a partnership for seven years between *Brooke* and *Pell*; but at the end of one year it was agreed to be dissolved, but no express dissolution was had. The agreement recited, that *Brooke* being desirous to have the profits of the trade to himself, and *Pell* being desirous to relinquish his right to the trade and profits, it was agreed, that *Brooke* should give *Pell* a bond for 2485*l.* which *Pell* had brought into the trade, with interest at five *per cent.* which was accordingly done. And it was farther agreed, that *Brooke* should pay to *Pell* 200*l.* *per annum* for six years, if *Brooke* so long lived, as in lieu of the profits of the trade; and *Brooke* covenanted, that *Pell* should have free liberty to inspect his books. *Brooke* became a bankrupt before any thing was paid to *Pell*. And this action being brought for a debt incurred by *Brooke* in the course of trade, Lord *Mansfield* held that *Pell* was a secret partner: He said, "This was a device to make more than legal interest of money, and if it was not a partnership, it was a crime. And it shall not lie in the defendant *Pell's* mouth to say, it is usury, and not a partnership."

But where a partner (who retires from the concern) lends money to his co-partner, upon an agreement to allow legal interest, with an additional annuity for a certain term of years; this is not a continuance of the partnership, even with respect to third persons, provided there has been public notice of the dissolution. Thus, in the case of *Grace v. Smith*, (k) which was an action of *assumpsit* for goods sold and delivered. On the trial a verdict was found for the defendant: and upon a motion to set aside this verdict, *De Grey* Ch. J. reported, that this was an action brought against *Smith* alone, as a secret partner with one

(i) *Sittings in the King's Bench*, 7 *Mar.* 1775. *coram* Lord *Mansfield*, cited in 2 *Bl. Rep.* 999.

(k) 2 *Bl. Rep.* 998.

Robinson to whom the goods were delivered, and who became bankrupt in 1770. That on the 30th of *March*, 1767, *Smith* and *Robinson* entered into partnership for seven years, but in the *November* afterwards some disputes arising, they agreed to dissolve the partnership. The articles were not cancelled; but the dissolution was open and notorious, and was notified to the public on the 17th of *November*, 1767. The terms of the dissolution were, that all the stock in trade, and debts due to the partnership should be carried to the account of *Robinson* only. That *Smith* was to have back 5200*l.*, which he brought into the trade, and 1000*l.* for the profits then accrued, since the commencement of the partnership: That *Smith* was to lend *Robinson* 4000*l.*, part of this 5200*l.*, or let it remain in his hands for seven years, at five *per cent.* interest, and an annuity of 300*l. per annum*, for the same seven years: For all which *Robinson* gave bond to *Smith*. In *June* 1768, *Robinson* advanced to *Smith* 600*l.* for two years' payment of the annuity and other sums by way of interest, and gratuities, and other large sums at different times, to enable him to pay the partnership debts, *Smith* having agreed to receive all that was due to the partnership, and to pay its debts, but at the hazard of *Robinson*. That on the 1st of *August*, 1768, the demands of *Smith* were all liquidated and consolidated into one, *viz.* 5200*l.*, due to him on the dissolution of the partnership, 1500*l.* for the remaining five years of the annuity, and 300*l.* for *Smith's* share of a ship: in all 7,000*l.* for which *Robinson* gave a bond to *Smith*. That on the 22d of *August*, 1769, an assignment was made of all *Robinson's* effects to secure the balance then due to *Smith*, which was stated to be 10,000*l.* Soon after the commission was awarded.

The Court of Common Pleas held, that these facts did not amount to a partnership. *De Grey* Ch. J. said: "The only question is, what constitutes a secret partner? every man who has a share of the profits of a trade ought also to bear his share of the loss. And if any one takes part of the profit, he takes a part of that fund on which the creditor of the trader relies for his payment. If any one advances or lends money to a trader, it is only lent on his general personal security. It is no specific lien upon the profits of the trade, and yet the lender is generally interested in those profits; he relies on them for repayment. And there is no difference whether that money be *lent de novo*, or *left behind* in trade by one of the partners who retires. And, whether the terms of that loan be kind or harsh, makes also no manner of difference. I think the true criterion is, to enquire whether *Smith* agreed to share the profits of the trade with *Robinson*, or whether he only relied on those profits, as a fund of payment: a distinction not more nice than usually occurs in questions of trade or usury. The jury have said this is not payable out of the profits: and I think there is no foundation for granting a new trial."

The principle adopted in these cases, but more particularly in that of *Waugh v. Carver*, was fully considered, and acted upon in a recent case of *Cheap* and others, assignees of *Brander* and *Barclay* bankrupts, v. *Cramond*, (1) where it appeared that the bankrupts, being merchants in *London*, recommended the defendant to consign goods to the house of *Ruxton* and Co., at *Rio Janeiro*, for sale; the latter were to remit the proceeds to the bankrupts, who were to pay over the same to the defendant. The bankrupts, upon receiving advices from *Ruxton* and Co., that the goods were sold, advanced money to the defendant, on account; and to recover which this action was brought; *Ruxton* and Co. afterwards failed without remitting the proceeds. It appeared, however, that the bankrupts and *Ruxton* and Co. divided equally the commission on the sale of all goods recommended by the one house to the other. Upon this it was argued that the bankrupts were partners *quoad hoc* with *Ruxton* and Co. and that the receipt of the proceeds of the goods was therefore a receipt by the bankrupts, and the advance by them to the defendant was a payment on account for which they were liable. In support of this proposition the case of *Waugh v. Carver* was cited and relied on. And the judgment of the Court of King's Bench was, that this agreement constituted a partnership. And *Abbot* Ch. J. said, "We are all of opinion that the present case cannot be distinguished in principle from that of *Waugh v. Carver*; and our decision must be governed by it. It is true that in that case a definite part of the commission was, by agreement of the parties, to be deducted as compensation for the charges and expences before a division took place, and also that each party was to share in some specified measure with the other, in other parts of the profits of their respective business, such as warehouse rent, and discount upon tradesmen's bills: And it was contended in this case, on the part of the plaintiffs, that the bankrupts and *Ruxton* were to be considered as dividing the gross proceeds only, and not the net proceeds or profits of each other's agency or factorage; and that a division of gross proceeds does not constitute a partnership. We think, however, that the previous deduction of a definite part of the commission before the division in the case cited, is an unimportant fact. It cannot have the effect in all cases of leaving the remainder as clear profit, because the expence and charge cannot be in all cases uniformly the same, but must vary with the particular circumstances of each transaction; so that in effect a part only of the gross commission or proceeds of the agency, and not the whole, was to be divided in that case; and taking the definite deducted part at a fifth, or any other aliquot part, the absent house, instead of receiving one-half, as in the case at bar, would

(1) 4 Barn. & Ald. 665.

by the agreement receive two-fifths, or some other definite part of the whole gross sum, and not an indefinite part thereof, depending upon the actual and clear profit of the transaction. And although in the case of *Waugh v. Carver*, the agreement was not confined to a division of the commission, but extended also to the monies received in certain other parts of the transactions of the two houses, yet the principle of the decision is not affected by that circumstance, the principle being that where two houses agree that each shall share with the other the money received in a certain part of the business, they are, as to such part, partners with regard to those who deal with them therein, though they may not be partners *inter se*."

So, in the case of *Bosanquet v. Wray*, (m) where it was agreed between bankers, carrying on business in copartnership as *London* bankers, that neither of the partners should be engaged or concerned in banking business, or any transaction, matter, or thing, relating thereto, otherwise than upon the account, and for the benefit of the partnership; and one member of the firm, with the consent of his partners, became a partner in a country bank; and the *London* house was in the habit of transmitting weekly to the country bank, an abstract of their account, and of striking the balance half-yearly; the Court of Common Pleas determined, that the *London* house were partners in the country bank.

If a member of a firm assigns his interest to another member of the same firm, either in trust to pay him an annuity for life, subject to vary as the profits of the concern vary; or in trust for such of his children as he should appoint; and in default of appointment in trust for the children, to be divided amongst them when the youngest should attain 21, the partnership continues. (n)

2. IN WHAT CASES THE PARTICIPATION OF PROFITS BY WAY OF REMUNERATION FOR SERVICES MAY MAKE A PERSON LIABLE AS A PARTNER TO THIRD PERSONS.] An agreement that a broker shall have for his own profit, whatever sum he can obtain upon the sales, above a certain sum, does not constitute a liability as partner to third persons. (o) But if a person, as a reward for his labour, choose to stipulate for an interest in the profits of the business, instead of a certain sum proportioned to those profits, he is, as to third persons, a partner; and no arrangement between the parties can prevent it. (p) So, where it is agreed to pay a person for his labour in a concern a given sum, in proportion to a given *quantum* of the profits, it has been considered to be settled, that this does not constitute a partnership as to third persons: but that it does constitute a partnership if he have a specific interest in the profits themselves as profits. This was settled

(m) 6 Taunt. 598. and 2 Mar. 319. S.C.

(n) Ex parte Wilson, Buck. Rep. 48.

(o) *Benjamin v. Porteus*, 2 H. Bl. 590.

(p) Ex parte Rowlandson, 1 Rose Rep. 91.

in the case *Ex parte Hamper* (q), where Lord Eldon said "The cases have gone to this nicety: upon distinction so thin that I cannot state it as established upon due consideration; that, if a trader agrees to pay another person for his labour in the concern a sum of money, even in proportion to the profits, equal to a certain share, that will not make him a partner; but if he has a specific interest in the profits themselves, as profits, he is a partner. It is clearly settled, though I regret it, that if a man stipulates that, as the reward of his labour he shall have not a specific interest in the business, but a given sum of money, even in proportion to a given *quantum* of profits, that will not make him a partner; but if he agrees for a part of the profits, as such, giving him the right to an account, though having no property in the capital, he is, as to third persons, a partner."

But where the proprietor of a lighter agreed with a person by whom it was hired, to share the profits from working the lighter, they are jointly liable to third persons; but if the proprietor agree with a person who works the lighter, that in consideration of working it he should receive half the gross earnings; there is not any joint liability. (r) So, where the proprietor of cattle agreed with the owner of land that the cattle should be pastured upon the land, and that the profit, after they were fatted, above a certain sum at which the cattle were estimated, should be equally divided between the proprietor of the cattle and the owner of the land; this is merely a mode of paying for the pasture, and does not constitute a joint liability. (s) So, if a person make himself responsible to the vendor for a purchase upon an agreement with the purchaser, that if any profit arise from the sale he should have one half for his trouble; this does not constitute a partnership between the parties. (t) So, where the sailors and captain agreed that the produce of the voyage should be divided in certain proportions amongst the owners, the captain, and the officers and seamen; it has been ruled, that this does not constitute a partnership between the parties, but that the sailors are entitled to wages in proportion to the produce of the voyage. (u) An agreement to pay in lieu of wages, primage, &c. one-fifth of the profit or loss of the voyage does not constitute a partnership with the captain or sailors. (v)

3. OF UNINCORPORATED SOCIETIES.] — The members of unincorporated societies or trading companies are liable to third persons as partners; for such companies are merely partnerships. (w) But when incorporated they possess the quality and privileges attendant upon all

(q) 17 Ves. 404.

(r) *Dry v. Boswell*, 1 Campb. 329.(s) *Wish v. Small*, *ibid.* 331. n.(t) *Hesketh v. Blanchard*, 4 East Rep. 144.(u) *Wilkinson v. Fraser*, 4 Esp. Rep. 182.(v) *Mair v. Glennie*, 4 Maule & Sel. 240.(w) *Curten v. Drury*, 18 Ves. 157.

corporations of not being individually liable for a corporate act. (x) In the case of *Rex v. Dodd*, (y) Lord *Ellenborough* Ch. J., in speaking upon the mischiefs attendant upon unincorporated societies with transferable shares, says, "But independent of the general tendency of schemes of the nature of the project now before us to occasion prejudice to the public, there is besides in this prospectus a prominent feature of mischief; for it therein appears to be held out, that no person is to be accountable beyond the amount of the share for which he shall subscribe, the conditions of which are to be included in a deed of trust to be enrolled. But this is a mischievous delusion." And Lord *Eldon* says in *Carlen v. Drury*, just cited in note (w), "I hold it to be clear that each individual is at law answerable for the amount of the whole debts in the concern."

4. OF A SUB-DIVISION OF PROFITS.] — A sub-agreement between a member of a partnership firm and a stranger, to share in his individual profits arising from the firm, does not, as it should seem, render the stranger liable to third persons as a partner in the firm. (z)

5. WHAT SHALL CONSTITUTE A PARTNERSHIP IN A PARTICULAR PURCHASE OR ADVENTURE, &c.] — In order to constitute a partnership in a particular purchase there must either be a joint undertaking to pay, or an agreement to share in the profit and loss. This point was determined in the case of *Hoare and others v. Dawes and another*, (a) which was an action for money lent and advanced. The facts of the case appeared to be as follow: the plaintiffs, who were bankers, had advanced a sum of money on certain tea-warrants of the *East India Company* to *Contencin*, a broker, who deposited the tea-warrants with the plaintiffs as a security, and also gave them his note of hand for the sum advanced. He had been employed by a number of persons, of whom the defendants were two, to purchase a lot of tea, at the *East India Company's* sale, of which they, (together with himself,) were to have separate shares, the lots being, in general, too large for any one dealer. The practice at such sales is, for the company to give a warrant or warrants to the broker or purchaser, for the delivery of the quantity of tea purchased, on payment being made. At the time of the sale 25l. per cent. is advanced, and is forfeited unless the whole is paid on the *third*, which is the *last* day of payment. If paid sooner, allowance is made for prompt payment. The warrants are often pledged, and money raised upon them; generally considerably less than the supposed value of the tea. It happened, however, in this instance, between the time of the deposit of the warrants with the plaintiffs, and the time when the payment was to be made at the *India House*, that the value of the tea sunk so much

(x) *Beaumont v. Merdith*, 3 Ves. and Beame Rep. 160.

(y) 9 East Rep. 516.

(z) Ex parte Barrow, 2 Rose Rep. 254.

(a) Doug. 371.

as to be considerably under the amount of the sum advanced. The broker, in the mean time, had become a bankrupt, and had informed the plaintiffs who his employers were, all of whom, except the defendants, were since either dead, or become bankrupts. The shares of the defendants were to be two-sixteenths of the whole lot. The ground of the action was, that all the employers of the broker were to be considered as partners, and jointly and severally liable for the whole. The defendants owed nothing upon their own two-sixteenths. There was not any joint concern in the re-disposal of the tea. The defendant produced several bankers and brokers, (of whom *Contencin* was one,) who said, they had had frequent transactions of this sort, (it being a very usual speculation,) and they always understood, that the only security was the pledge, and the personal security of the broker, unless where the principals were enquired after, and declared, which was very rarely done. That, as the practice was to advance considerably under the supposed value of the tea, and it was also usual to stipulate, that, if the money was not repaid within a certain time, the lender might sell, the warrant was of itself a general and sufficient security. *Contencin* said, that tea-warrants were considered as cash, and passed by delivery. On the other side, *in answer to this evidence*, (the plaintiffs having, at first, rested their case on the fact, that there were persons behind the curtain, for whom the broker acted,) two witnesses were called: one of them, one *Car-izony*, a tea-dealer, swore, that a broker had once borrowed some money *for him* on tea-warrants, from the plaintiffs, and that the value of the tea having fallen under the sum advanced, and the broker having failed, he had paid the difference, considering himself as liable. The other was a person who had also dealt in tea and in loans of this sort, and he swore, that his idea had always been that the persons behind the curtain were liable; but, upon cross examination, he said, he never knew any loss happen, nor any demand actually made on the broker's employers.

The Court of King's Bench, upon these facts being stated, were of opinion that they did not constitute a partnership. And *Butler* Just. said, "This is a very plain case. The plaintiffs had no reason to consider the broker as a partner with the other persons, for though he had a share, he did not act or appear as a partner. Nor were they partners as among themselves. They had never met or contracted together as partners. If this transaction were sufficient to constitute a partnership, a broker would have it in his power to make 500 persons partners, who had never seen or heard of one another, or might, at his pleasure, convert his principals into partners, or not, without any authority from them, by taking joint or separate warrants."

So, where one person agrees to buy a quantity of goods, and to let others have a certain proportion of them, he alone is answerable; such a transaction being considered a mere *sub-contract*, and not a *partner-*

ship. Thus, in the case of *Coope and others v. Eyre and others*, (b) which was an action of *assumpsit*, brought by the plaintiffs as owners of a *Greenland* ship, called the *Earl of Chatham*, against the defendants, as partners, on an agreement to purchase oil, the cargo of a ship. It appeared that on the 24th August, the defendants, *Eyre*, for himself and partners, (who were *Atkinson* and *Walton*, general merchants) *Hattersley*, for himself and *Stephens*, who were oil merchants, and *Pugh*, for himself and son, who were also oil merchants, agreed to purchase jointly as much oil as they could procure, on a prospect that the price of that commodity would rise; that *Eyre* should be the ostensible buyer, and the others *share in his purchase at the same price which he might give*. *Hattersley* and Co. were to have one-fourth, *Pugh* one-fourth, and *Eyre* and Co. the remaining moiety; that they bought large quantities of oil belonging to other ships and other traders besides the plaintiffs, in the name of *Eyre* and Co.; that *Hattersley* and *Pugh* occasionally came forwards, and gave directions as to the delivery of the oils, and otherwise interfered in the transaction, and also made many declarations, "that they were all jointly interested in the different purchases, and that there was a general concern between them." The evidence as to this point was in substance as follows: *Garforth*, the broker, proved the contract, signed by *Eyre*, for himself and Co.; general orders from *Eyre* only to purchase any quantity of oil which might offer. *Hattersley* and *Pugh* told him they were to have a *part* of what was purchased in the firm of *Eyre* and Co., and that they were *jointly* concerned. They went to receive a cargo sold by *Thwaites*, at *Blackwall*. *Thwaites*, who had also sold oil to the defendants, proved that *Hattersley* said, "*It is all the same whether Eyre or I buy it; it is the same concern;*" and that *Pugh* said, "*Hattersley and I am concerned;*" that they attended to see the oil gauged: *Strickland*, who had the care of *Greenland* dock, proved that *Hattersley* and *Pugh* said, "*We have purchased your oil;*" that on failure of *Eyre* and Co., *Pugh* sent an order not to deliver the oil of the ship *Britannia*, which had been purchased by *Eyre* and Co., and had the cellars locked. *Kilbington* sold oil to *Eyre* and Co. by *Garforth* the broker, delivered to *Hattersley*, who gave in payment a bill accepted by *Eyre* and Co., and his own note, to indemnify the witness in making an indorsement. Captain *Hastings* sold oil to *Eyre* and Co. by the same broker, for which *Pugh* signed an agreement. Captain *Dowson* also sold oil by *Garforth* to *Eyre* and Co., for which *Pugh* gave a receipt; and being asked, whether the buyers were responsible persons, told the witness he was safe, saying "I am concerned, *Hattersley* is concerned, and there is a house at *Norwich* which can buy us all." *Pugh* afterwards repeated this in the presence of *Hattersley*, who acknowledged it to be

(b) 1 H. Bl. 37.

true. *Phelps* proved that he was agent to sell oil for a Mr. *Yeomans*, and not trusting to *Eyre* only, whom he considered as a mere speculator, required the names of the others concerned to be given in, upon which *Garforth* the broker gave in the names of *Hattersley* and Co. On the part of the defendants, it was insisted that the contract for sale was made between the plaintiffs and *Eyre* and Co. only, and that the agreement which the defendants entered into between themselves was only a sub-contract, and did not constitute a partnership. Lord *Loughborough* Ch. J., after declaring his opinion, (that as the defendants did not appear to have been jointly concerned, further than the purchase of the oil, they had not such a joint interest in the profits and loss as the law made necessary to a partnership,) directed a verdict to be found for them, which was accordingly done. But the plaintiff's counsel afterwards moved for a rule to show cause why a new trial should not be granted. In support of the rule they admitted that a participation of profit and loss was necessary to constitute a partnership, and argued that this was a contract of that nature. Whether the agreement be to divide the goods themselves at a given time, or the produce on the sale of them, each party runs the same risque, and each has his share of profits and loss, either in the increased or decreased value of the goods, or the increased or decreased price for which they might actually be sold. It could not be a sub-sale to *Hattersley* and *Pugh*, because each was to have a share on the same terms as *Eyre* and Co. purchased. But *Eyre* and Co. were merchants, and merchants never buy to sell again at *prime cost*. *Hattersley* and *Pugh* must therefore be said to have shared originally in these bargains, and not to have purchased any second part of them. The spirit of buying and selling is gain: the spirit of partnership is mutual participation of gain.

The majority of the Court determined, that this transaction was not a partnership. And *Heath* Just. said, "The question for the determination of the Court is, whether the contract made with the plaintiffs is so far binding on the defendants, *Pugh*, *Hattersley*, and *Stephens*, as to make them liable on the failure of *Eyre* and Co.?" If this contract may be considered independently of the other contracts given in evidence, there could be little doubt. *Eyre* and Co. employ *Garforth*, their broker, to buy oil, and it is agreed that the other defendants shall have aliquot parts when the commodity is purchased. This is a sub-contract. By a sub-contract I mean a contract subordinate to another contract, made or intended to be made, between the contracting parties on one part, or some of them and a stranger. *Eyre* and Co. are the only purchasers known to the plaintiffs; entire credit was given to them alone. *Pugh*, *Hattersley*, and *Stephens* can be liable only in the event of a concealed partnership, on this principle, "that the act of one partner binds all his co-partners, on account of the communion of profit and

loss." In truth, they were not partners, inasmuch as they were only interested in the purchase of the commodity, and not in the subsequent disposition of it. Great reliance has been placed on this being a joint concern, and a joint speculation. It is so between the defendants, but the contracts made with the other vendors are different. A contract made between A. and B. cannot be given in evidence to explain a contract made between A. and C. It is *res inter alios acta*. In fact, the defendants have pledged themselves explicitly with other persons in a different manner. The contracts made with other merchants are not admissible evidence in this cause, except to prove a fraud, if the facts had gone that length; namely, that the house of *Eyre and Co.*, as a failing house, was to stand forwards, in order to protect the other defendants, who, by such means, might have the benefit of the speculation, if it proved fortunate, without sustaining any loss in the event of its failing. No such evidence has been adduced; on the contrary, it appears that the objection made by the other vendors to the firm of *Eyre and Co.* was, "*that they were unknown, and new in the trade.*" No detriment from this decision can arise to trade, or affect the credit of merchants; for it behoves every contracting party to consider the responsibility of the persons with whom he contracts, and he has also the resource of a dormant partnership, if any such exist and can be proved. For these reasons I am of opinion that the rule ought to be discharged." And of this opinion were Mr. Just. Gould and Lord Loughborough. But Mr. Just. Wilson differed in opinion with the rest of the Court.

So, in another case, (c) where A. having neither money nor credit, offers to B. that if he will order with him certain goods to be shipped upon an adventure, if any profit should arise from them, B. *should have half for his trouble*; B. having lent his credit on this contract, and ordered the goods on their joint account, which were furnished accordingly, and afterwards paid for by B. alone; it was holden that he was entitled to recover back such payment in *assumpsit* against A., who had not accounted to him for the profits. Lord Ellenborough Ch. J. said, "The distinction in *Waugh v. Carver*, (d) applies to this case. Quoad third persons it was a partnership; for the plaintiff was to share half the profits. But as between themselves, it was only an agreement by way of compensation for the plaintiff's trouble."

If several persons agree in an adventure to the *East Indies*, and to provide a cargo of goods which shall in the judgment of the majority be proper for the voyage; and permission is given to the ship's husband to ship on the joint account as many goods as he may think fit; such goods being first approved by a majority of the persons concerned in the adventure as proper for the voyage, and such ship's husband shall

(c) *Hesketh v. Blanchard*, 4 East Rep. 144.

(d) Antc, 446.

share a proportionate profit and loss with the respective adventurers; and it is afterwards agreed, that each party is to hold no other share or proportion in the said concern than the amount of what each separately orders and ships: and that the orders given for the cargo and outfit of the ship are to be separately paid; and that one is not bound for any goods or stores ordered or shipped by the other, and that the supercargo shall have free liberty to ship what goods are suitable to the voyage, over and above the ship and outfit, leaving room for those ordered by the adventures; and that the ship be made over in trust for the general concern: if the supercargo afterwards purchase goods for part of the cargo, and the ship sail with the goods so purchased as part of the cargo, and with other goods; the liability for such goods is only the separate liability of the supercargo. (e) And Lord *Kenyon* Ch. J. said, "At the time that this copper was furnished, *Pearce*, the ship's husband, stood in no relation whatever with the other persons; but he alone bought the copper in his own name, without carrying to market the name of any other person but his own. Suppose the plaintiff had brought an action for this copper the instant it was delivered on board, against whom must the action have been brought? *Pearce* only; for he alone was answerable at that time. I cannot therefore see how it can be said that these goods which were sold to *Pearce* only, and on his sole credit and account, were sold and delivered on the partnership account. Afterwards, indeed, these defendants were to gain or lose by the joint cargo; when the other goods were brought in, the partnership arose; but each was to bring in his own particular stock. But in this case I think that the question stops short of affecting the defendants; and I cannot see how the plaintiff can have a right to call on the defendants as partners for the value of these goods on a supposed contract, when the real contract between the buyer and seller was consummated before the joint risk began. Suppose several persons agree to open a banker's shop, and it was agreed that each partner should bring into the house a certain sum of money as his share, it could not be contended, that if one of them were to borrow money for his share, all the others would be liable for it." But in the case of *Gouthwaite v. Duckworth*, (f) it was determined, that if a creditor having been jointly concerned with his debtor, agree with such debtor to be jointly and equally concerned in an adventure abroad, and that such debtor shall purchase and pay for goods for the adventure, and the returns shall be made to the creditor in liquidation of his debt; and in consequence of such agreement, the debtor purchase goods for such adventure; it is a partnership agreement, and both debtor and creditor are liable to the vendors of the goods. And Lord *Ellenborough* Ch. J. shows the distinction between this case and the last: his Lordship says, "The case of

(e) *Saville v. Robertson*, 4 Term Rep. 720.

(f) 12 East 421.

Saville v. Robertson does indeed approach very near to this, but the distinction between the cases is, that there each party brought his separate parcel of goods, which were afterwards to be mixed in the common adventure on board the ship, and till that admixture, the partnership in the goods did not arise. But here the goods in question were purchased in pursuance of the agreement for the adventure, of which it had been before settled, that *Duckworth* was to have a moiety. And Mr. Justice *Bayley* observed, "That in *Saville v. Robertson* after the purchase of the goods made by the several adventurers, there was still a further act to be done, which was the putting them on board the ship, in which they had a common concern for the joint adventure; and until that further act was done, the goods purchased by each, remained the separate property of each. But here as soon as the goods were purchased, the interest of the three attached in them at the same instant, by virtue of the previous agreement."

In the case of proprietors of stage coaches it has been held, that if the proprietors of a stage coach from *London* to a distant place, divide the road into different quarters; and the separate proprietors are severally the owners of the harness and horses which draw the coach through their respective districts, and severally provide their stabling, food, and horse-keepers in their districts, and the profits are divided in proportion to the number of miles; and it is notorious on the road, that the separate proprietors horse the separate stages, and that the tradesmen on the road give credit to the separate proprietors for all goods furnished to them, and there is no evidence that purchases made by the separate proprietors are, upon the general adjustment of accounts between all the proprietors, computed as part of the general outgoings;—and if goods are delivered to one of the proprietors for the use of his horses, by a vendor, who is the owner of the stable where such horses are kept, and who receives part of the price of the goods by a bill drawn separately on such proprietor, and who expresses his fears that upon the failure of such proprietor, he shall lose the residue; such vendor can recover only from the proprietor with whom he immediately dealt. (g)

A partnership may exist in a particular concern without constituting a general partnership, unless a representation is made of a general partnership. Thus, in the case of *De Berkomp v. Smith and Lewis* (h), which was an action of *assumpsit* to recover the value of a quantity of foreign lace against the defendants, charging them as partners. It was admitted that *Smith*, one of the defendants, was liable, but the other defendant, *Lewis*, denied that he was a partner. This was the only question in the case. The evidence on the part of the plaintiff was, that he was a foreigner living at *Lisle* in *Flanders*; that having been

(g) *Barton v. Hanson*, 2 Campb. 97. (h) 1 Esp. Rep. 29.
3 Taunt. 49.

applied to by the defendants for a quantity of lace on credit, that before he would furnish it, he wrote over to his correspondent in *London* to inquire concerning their circumstances and situation; that his correspondent had inquired from Mr. *Botham*, a merchant in *London*, who informed him that they were in partnership in trade, which information the correspondent communicated to the plaintiff, who in consequence thereof gave them the goods on the terms they asked. The only connexion in trade between Mr. *Botham* and the defendants, was in discounting bills, which Mr. *Botham* had been in the habit of doing for *Smith*, one of the defendants, but that on discounting a bill at one time for *Smith*, he had introduced *Lewis* to him as his partner. Lord *Kenyon* Ch. J. upon the evidence ruled, "That it was not sufficient to charge *Lewis* as a partner." That persons might be partners in a particular concern or business, but that notwithstanding if they did not appear to the world as partners, that it should not be sufficient to constitute a general partnership, and make them liable in other cases not connected with such particular business. That the circumstance in evidence of the introduction of *Lewis* to Mr. *Botham* should be taken *secundum subjectam materiam*, that is, as applying to the transaction in which *Smith* was concerned with Mr. *Botham*, the discounting of bills, to which transaction only it should be confined, and that he was therefore of opinion, that without further evidence a general partnership could not be established, in order to charge *Lewis* the other defendant in this action." However, it afterwards appearing in evidence that in part *Lewis* had represented himself to the plaintiff as partner in trade with *Smith*; his lordship, in his charge to the jury, added, "That though, in point of fact, parties are not partners in trade, yet if one so represents himself, and by that means gets credit for goods for the other, that both shall be liable." The plaintiff therefore upon this evidence obtained a verdict.

6. IN WHAT CASES A PERSON, NOT BEING IN FACT A PARTNER, MAY NEVERTHELESS MAKE HIMSELF LIABLE AS SUCH WITH THIRD PERSONS.] If a person suffers his name to be used in a business, and holds himself out as a partner, though in point of fact no partnership exists, he is liable to a creditor who contracts with the firm. This was determined in the case of *Young v. Astell* and another (i), which was an action to recover 600*l.* and upwards for coals sold and delivered by the plaintiff, a coal merchant. An agreement between the defendants was given in evidence, stating that the defendant Mrs. *Astell* had lately carried on

(i) Cited in 2 H. Bl. 242. Note, if there be a particular stipulation between joint dealers, that one of them shall not be liable as a partner, and notice thereof is given to some with whom they deal, those to whom such notice is given, cannot sue him, though he may take a share of the profits. *Alderson v. Pope*, 1 Campb. 404. n.

the coal trade, and that the other defendant did the same; that Mrs. *Astell* was to bring what customers she could into the business, and that the other was to pay her an annuity, and also 2s. for every chaldron that should be sold, to those persons who had been her customers, or were of her recommending. The plaintiff also proved, that bills were made out for goods sold to her customers, in their joint names; and the question was, whether Mrs. *Astell* was liable for the debt? Lord *Mansfield* said, "He should have rather thought on the agreement only, that Mrs. *Astell* would be liable, not on account of the annuity, but the other payment, as that would be increased in proportion as she increased the business. However, as she has suffered her name to be used in the business, and held herself out as a partner, she was certainly liable, though the plaintiff did not at the time of dealing know that she was a partner, or that her name was used." And the jury accordingly found a verdict for the plaintiff.

7. OF INFANT PARTNERS.] If the executors of a deceased partner continue his share of the partnership property in trade for the benefit of an infant; and the partnership business is continued, and the executors divide the profits and loss with the partners, they are partners and liable as such, though they act solely for the benefit of the infant, and though their names are not used in the business. (*k*)

If during a partnership, between an adult and an infant, the partners for the purpose of carrying on their trade take a lease of certain premises, and the lease purports to be granted in consideration of a sum paid by the infant and the adult, of which one moiety is paid by the infant in the presence of the adult, and bills of which the first is due four months after date, are drawn by the lessor for the other moiety, and accepted by the infant in the partnership firm, and if upon his attaining twenty-one, some weeks before the first bill is due, he dissolve the partnership, but his name remain over the door for three weeks afterwards; and if the adult enter into a new arrangement with the lessor, by which he gets a remission of part of the rent and taxes; and when the first bill becomes due it is dishonoured, and the lessor sue the adult alone, who compromises the action, without the knowledge of the infant, by surrendering the lease to be cancelled, and by having the bills destroyed; and no express notice is given by the infant to the lessor of his disaffirmance of the contract; and the infant commence an action against the lessor for the moiety which he paid; it ought to be left to the jury to determine whether the lessor has not dispensed with formal notice of disaffirmance. (*l*)

If an infant partner do not, upon his attaining the age of twenty-one,

(*k*) *Wightman v. Townroe*, 1 Maule & Sel. 413.

(*l*) *Holmes v. Blogg*, 3 Taunt. 35. 1 Moore 466.

notify his discontinuance of the partnership, he is liable as a partner for goods supplied after he attains that age. (m)

If a father open a bank in his own name and the name of an infant son, who has no interest in the concern, the father cannot in his own name maintain an action against a customer of the house for money advanced, unless it appear that the son has no share as partner with the father, and that the money advanced belonged to the father: for though an infant be a member of a firm, yet he must join in an action for recovery of a debt due to the firm. (n) But if one of two partners is an infant, the holder of a bill accepted by both, may declare upon it as accepted by the adult only, and if the defendant pleads in abatement that the other partner ought to be joined with him as a defendant, the plaintiff must reply his infancy, and it is no departure. (o)

2. OF THE LIABILITY OF PARTNERS UPON CONTRACTS, &C. MADE BY ALL OR ANY OF THEM DURING THE PARTNERSHIP.

1. OF THE PURCHASE, SALE, AND WARRANTY OF GOODS; AND OF THE PLEDGING THEREOF.] — It is a general rule, that the act of every single partner, in a transaction relating to the partnership, binds all his copartners, however disadvantageous it may happen to be to the concern; and even though it should be against the express stipulation of the articles of partnerships: they must also bear the loss happening by the fraudulent conduct of their partner in the disposition of goods purchased. Thus, in the case of *Bond v. Gibson* and *Jephson* (p), which was an action of *assumpsit* for goods sold and delivered. It appeared, that while the defendants were carrying on the trade of harness-makers together, *Jephson* bought of the plaintiff a great number of bits to be made up into bridles, which he carried away himself; but that instead of bringing them to the shop of himself and his copartner, he immediately pawned them to raise money for his own use. For the defendant *Gibson* it was contended, that this could not be considered a partnership debt, as the goods had not been bought on the partnership account, and the credit appeared to have been given to *Jephson* only: it was admitted that the case would have been different, had the goods once been mixed with the partnership stock, or if proof had been given of former dealings upon credit between the plaintiff and the defendants. But Lord *Ellenborough* Ch. J. said, “ Unless the seller is guilty of collusion, a sale to one partner is a sale to the partnership, with whatever view the goods may be bought, and to whatever purposes they may be applied. I will take it that *Jephson* here meant

(m) *Goode v. Harrison*, 5 Barn. & Ald. 147.

(n) *Teed v. Elworthy*, 14 East. 210.

(o) *Burgess v. Merrill*, 4 Taunt. 468. See also *Gibbs v. Merrill*, 3 Taunt. 313.

(p) 1 Campb. 185.

to cheat his co-partners ; still the seller is not on that account to suffer. He is innocent, and he had a right to suppose that this individual acted for the partnership." The plaintiff accordingly obtained a verdict for the full amount of the goods.

So, if two persons in partnership for the sale of horses, agree between themselves never to warrant any horse ; yet though this be their course of business, if upon the sale of a horse, the property of the partnership, one of them give a warranty, the other will be bound by it (*q*) But if three persons enter into partnership as sugar brokers, and it be agreed that none of the partners should buy any sugars for the trade without the consent of a majority of the partners ; and that if any of them should buy sugars without such consent, the same should be at the risk of the person so buying them, and the other partners should not be liable to the payment of the same ; and if, after the trade has been carried on for some time, one of the partners give notice to his co-partners that he will no longer be concerned in the joint trade, and will withdraw or dispose of his share of the stock, and cause an advertisement to that effect to be fixed and published in the Exchange : and if subsequent to this notice, the two remaining partners treat with a trader for the purchase of some raw sugar ; and the outgoing partner being informed of the treaty, give notice to the trader that he will not be accountable for any sugars which the remaining partners may buy of him ; and the trader answer, that he is satisfied with the security of the remaining partners only, and will sell them his sugars on their account and credit, and the trader take promissory notes in their names only, and a separate account is kept of the sugars, and they are not blended with the common stock of the partnership ; the outgoing partner is not liable (*r*)

If two persons enter into a speculation for the purchase of goods, so as to be partners in that single transaction, a pledge by one of the partners of the partnership's goods, to a person who has not notice that the property is joint, and where there is no fraud ; binds the firm. (*s*) Partners may bind each other in transactions relating to the joint trade, unless there is notice of any particular circumstance to vary the joint liability ; but if the transaction does not relate to the partnership, the firm is not liable, except under special circumstances, by the act of one partner. (*t*)

2. OF A GUARANTEE ENTERED INTO BY ONE OF SEVERAL PARTNERS IN THE NAME OF THE FIRM, EITHER ON ACCOUNT OF THE PARTNERSHIP, OR ON HIS OWN SEPARATE DEALING, &c.] If one of several partners enter

(*q*) Per Abbott Ch. J. in *Sandilands v. Marsh*, 2 Barn. & Ald. 679.

(*s*) *Raba v. Ryland Gow*, Ni. Pri. Cas. 132.

(*r*) *Menvel v. Whiney*, 5 Bro. P. C. 489.

(*t*) Ex parte Agace, 2 Cox Rep. 312.

into an agreement with a customer, as to the terms on which certain business shall be conducted by the firm, although such business is out of their usual course of dealing, and even contrary to their own private arrangement; yet if such business is done in the name of the firm, and with the knowledge of the other partners, all are liable to, and bound by the agreement. Thus, in the case of *Sandilands v. Marsh*, (u) where it appeared that the defendant, who was a navy agent, had formerly been in partnership with Mr. Creed, and that the firm of Marsh and Creed had been the navy agent to Mr. Howden. On the 12th September, 1811, Mr. Creed wrote the following letter to Mr. Howden: "I have an opportunity of employing your remaining property in the stocks for three or four years in a way that will double, or nearly so, the income you derive from that source. It is by an annuity of 8 per cent. per annum on three lives, secured on property, the receipts of which pass through our hands, and will be guaranteed by our house, and not redeemable till after three years. The party granting the annuity is in the receipt of a clear unincumbered income of above 12,000*l.* per annum, and will, as soon as he can after three years, redeem the annuity; so that your capital remains untouched. For our trouble in the business, and for guaranteeing the punctual half-yearly payment of the annuity to you, we should expect a commission of 5 per cent., but the benefit you would derive from the arrangement would very well allow of it. Windsor's and this annuity would soon clear off the advance on our account, and leave your income materially improved. If you see this business in the light I do, and will say aye or no by return of post, I will either go on with it, and send you down a bank power for sale of your stock, or else secure it for some other friend." This letter was signed Richard Creed. Howden immediately accepted this offer, and a joint power of power of attorney was transmitted, empowering Marsh and Creed to sell the stock, and the stock was accordingly sold out on 7th of January, 1812. On the 23d of January, 1813, the annuity in question was purchased of Mr. Joshua Rowe, and after having been paid for about two years became in arrear. Howden died the 7th of March, 1813. By a letter dated the 10th April, 1813, signed Marsh and Creed, in answer to an application made on the part of Mr. Howden's representatives, they stated in substance as follows:—"He has two annuities, one yielding a clear 400*l.* per annum, payable quarterly, exclusive of the amount of the annual premium on the insurance of the life of Mr. Rowe, the grantor, at the Equitable Insurance Office, and the purchase-money for which was 4,000*l.* in place of 5,000*l.*, which we informed Mr. Howden we should give for it. This is guaranteed by our house on a commission, and is not determinable for three years." Neither of the

(u) 2 Barn. & Ald. 673.

above letters were entered in *Marsh* and *Creed's* letter-book, nor did it appear that *Marsh* had personally any knowledge of the guarantee. It was proved, that it was no part of the ordinary business of navy agents to deal in annuities. The charge of 5 per cent. commission had never been made by only 2½ per cent. The usual commission of navy agents, had been charged in the different accounts transmitted by *Marsh* and *Creed*. In those accounts, however, there were found several items referring to the sale of the stock and the receipt of the annuity. Under these circumstances it was contended, first, that this guarantee by *Creed* could not bind his partner *Marsh*: But the Court held that it did: and that the verdict, which had been given for the plaintiff, was right. *Abbott Ch. J.* said, "The material question which has been raised upon the facts proved at the trial is certainly most important and extensive in its consequences, namely, whether this defendant shall be held to be bound by the guarantee given without his knowledge, by his partner, *Creed*, and and if the verdict of the jury finding him to be so bound, be not sustainable, it will be very dangerous hereafter to deal with a partnership; for the business in each department of a firm is generally transacted by one partner only. It has undoubtedly been held, that in a matter wholly unconnected with the partnership, one partner cannot bind the others. But the true construction of the rule is this, that the act and assurance of one partner, made with reference to business transacted by the firm, will bind all the partners. In this case the proper business of *Marsh* and *Creed* was, to receive the money due from the navy board to their customers, and their dividends in the public funds; upon which business they charged *Howden* with a commission of 2½ per cent. It was no part of their ordinary business to guarantee annuities, or to lay out the money of their customers in the purchase of them. Under these circumstances, the original proposal was made by *Creed*, in answer to which the joint power of attorney was transmitted to *Marsh* and *Creed*, under which the stock was afterwards sold. Now that sale must have appeared in the partnership books; and if that fact were doubtful, it is proved by the balance stated in the accounts transmitted by the partnership; that sale, therefore, and the fact that the proceeds had been laid out in the purchase of an annuity, either were actually known, or ought to have been known, by *Marsh*. Now, if that whole transaction was known to him, the guarantee which is connected with it becomes, in point of law, an assurance made by one partner with reference to business transacted by both; and according to the rule previously stated, it will bind both."

But if a member of a partnership firm have separate dealings with a house of trade; and as a security for such dealings, give the guarantee of the firm without their privity, it shall not bind the firm. Thus, in

the case of *Hope v. Cust*, (v) where it appeared that Mr. *Fordyce* who traded very largely in his separate capacity, as well as in the business of a banker, in partnership with others, having considerable dealings in his private capacity with *Hope* and Co. in *Holland*, did, for and in the names of himself and partners, give them a general guarantee for the money due from him in his separate capacity. *Fordyce* became a bankrupt, and afterwards all the partners became bankrupts. And a bill was filed in the Court of Chancery by *Hope* and Co. in order to have the benefit of this guarantee: upon which that court directed an issue to try the validity of it. Lord *Mansfield*, in summing up the evidence to the jury, said, "There is no doubt but that the act of every single partner in a transaction relating to the partnership binds all the others. If one give a letter of credit or guarantee in the name of all the partners it binds all. But there is no general rule which may not be infected by covin, or such gross negligence as may amount to, or be equivalent to covin; for covin is defined to be a contrivance between two, to defraud or cheat a third. Therefore the whole will turn on this, whether the taking the guarantee from *Fordyce* himself in his own hand-writing, without consulting the other partners, or having their privity, is not such gross negligence in the *Hopes* as will amount to a fraud or covin. *Fordyce* was acting in two several capacities, having transactions in his own name only, for his own separate benefit, and in the names of the partnership for his own benefit. This case comes out of Chancery, where an affidavit or answer of all parties might have been had if necessary; but none such has been produced, and therefore it must be taken that the partners knew nothing of it, and had no profit by it, or privity in the transaction. Another fact to be granted is, that as between *Hope* and Co. and *Gurnal* and Co., and *Fordyce*, the whole transactions are avowedly with *Fordyce* only in his separate capacity. The next fact is the correspondence in 1770, preceding the second guarantee. It is clear, that *Fordyce's* deposits and interests in the funds were both doubted, and then the *Hopes* tried to make a scheme to get a second security without shocking him, by suggesting there was a new partner. The first guarantee was given in 1764, and that never had been called in, and still existed. There was then no occasion for a new one: for the change of a partner, and taking in a new one, would not destroy a former guarantee. The scheme was to get security for debts not well secured, the goodness of which was doubted; and they therefore get this from *Fordyce* alone, clandestinely, without the knowledge of his partners. If the fact be clear that *Hope* and Co., and *Gurnal* and Co., knew that this was done to

(v) *Sittings at Guildhall after Mich. Term. 1774. coram Lord Mansfield, Ch. J. cited by Laurence Just. in 1 East. Rep. 53.*

cheat the partners of *Fordyce*, there is no question in the cause. But it is manifest that they trusted to it as binding on the partnership. Therefore this brings it to the second question, whether it be not a gross negligence; especially as they knew at the time that *Fordyce* was acting in his separate capacity; and this security was intended to indemnify them against his separate debts. Verdict for the defendant. Lord *Mansfield* afterwards, in his report to the Court of Chancery, on a motion being made for a new trial, said, three things were established to the satisfaction of himself and the jury. First, that the transactions between *Hope* and Co. and *Fordyce* were wholly on *Fordyce's* account. Secondly, that the partners of *Fordyce* derived no profit or benefit whatsoever from them. Thirdly, that they had no notice of the guarantee; and consequently did not acquiesce in it. And Lord *Mansfield*, said, he left it to the jury, whether under these circumstances the taking of these guarantees were, in respect of the partners, a fair transaction or covinous, with sufficient notice to the plaintiffs of the injustice and breach of trust *Fordyce* was guilty of in giving them."

3. OF THE DRAWING, ACCEPTING, AND INDORSING OF BILLS OF EXCHANGE, &c. BY ONE OF SEVERAL PARTNERS, EITHER UPON JOINT OR SEPARATE ACCOUNT.] — If one of several partners draw, accept, or indorse a bill or note, or enter into any other contract, not under seal, in the name of the partnership firm, for any thing relating to the joint concern, all the partners are bound by it, and liable to the person with whom the engagement is made, if the latter has acted *bonâ fide*. The same liability may also, in some instances, be incurred upon a bill or other negotiable instrument given by one partner, in the name of the partnership firm, for his own *separate* debt or concern. Thus, in the case of *Swan* and others v. *Steele*, Clerk, and *Wood*, (w) which was an action of *assumpsit*, wherein the plaintiffs declared, first, on a bill of exchange, dated 26th of *August*, 1803, drawn by *D. Maitland* on *Campbell* and Co. for 342*l.* payable to the order of the defendants, and one *George Payne*, deceased, three months after date, and indorsed by the defendants and *Payne*, under the firm of *Wood* and *Payne* to the plaintiffs; and which bill *Campbell* and Co. had accepted. At the trial, the jury found a verdict for the plaintiff for 368*l.* 5*s.* 4*d.*, subject to the opinion of the Court on the following case: "*Wood* and *Payne*, mentioned in the pleadings, were wholesale grocers in *Liverpool*, trading under the firm of *Wood* and *Payne*, from *January* 1802, until *January* 1804; with whom the defendant *Steele* became a partner in *May* 1802, and so continued till *January* 1804, in the business of buying and selling cotton; which business was also carried on under the same firm of *Wood* and *Payne*, and at their counting house; but *Steele* was never interested in the grocery business. *Steele* took no active part in the cotton concern; nor

(w) 7 East, 210.

was it known to the world or to the plaintiffs that he was a partner. *The plaintiffs sold to Wood and Payne, as grocers, a quantity of sugar, for which they gave their acceptance in the firm of Wood and Payne at four months, due the 11th of October, 1803; and not being able to provide for it when due, Wood and Payne on the 8th of October, 1803, delivered to the plaintiffs the bill mentioned in the declaration due the 29th of November, with others, to provide for that acceptance; and the bill was indorsed by either Wood or Payne, in the firm of Wood and Payne, without the actual knowledge of Steele, as all other bills in the cotton concern were. The said bill had been paid to Wood and Payne, as cotton dealers by the drawer thereof for cotton sold to him, in which Steele was, as aforesaid, interested; and the name "D. Maitland" thereto subscribed as the drawer, was the handwriting of D. Maitland of Wigan, to whom the cotton was sold. The said bill has been dishonoured, of which Wood and Payne had due notice. Wood and Payne became bankrupts on the 16th January, 1804, and the effects of the cotton concern were insufficient to discharge its debts; and Steele, when he should have discharged those debts, would have been a creditor of the concern. The question for the opinion of the Court was, whether the plaintiffs were entitled to recover? If they were, then the verdict was to stand; otherwise, a verdict was to be entered for the defendant Steele."* The Court determined, that the plaintiffs were entitled to recover. And Lord *Ellenborough* Ch. J. said: "It would be a strange and novel doctrine to hold it necessary for a person receiving a bill of exchange indorsed by one of several partners, to apply to each of the other partners to know whether he assented to such indorsement; or otherwise that it should be void. There is no doubt that in the absence of all fraud on the part of the indorsee, such indorsement would bind all the partners. There may be partnerships where none of the existing partners have their names in the firm. Third persons may not know who they are; and yet they are all bound by the acts of any of the partners in the name or firm of the partnership. The case is too clear for argument, and I should not have permitted the point to be reserved, if I had not understood at the trial that there were some other facts in the case which might raise a doubt. The distinction is well settled, that if a creditor of one of the partners collude with him to take payment or security for his individual debt out of the partnership funds, knowing at the time that it is without the consent of the other partner, it is fraudulent and void; but if taken *bond fide* without such knowledge at the time, no subsequently acquired knowledge of the misconduct of the partner in giving such security can disaffirm the act. Now here the three persons were trading under the firm of *Wood and Payne*, and in the course of their dealings as partners received the bill in question;

and it was competent to either of them by his indorsement, in the name of the firm, to pass their interest in the bill : and the plaintiffs, ignorant of any fraud at the time, take it by such indorsement from one of the partners. Then if the interest of the plaintiffs in the bill were once well vested, no subsequent knowledge that such indorsement was made without the consent of one of the partners will divest it. And it would be highly inconvenient that it should ; because if the plaintiffs had been apprised at the time, that the partner who indorsed the bill had no authority to do so, they might have obtained some other security for their demand.

But in the case of *Wells v. Masterman* and others, (y) which was an action of *assumpsit* on two bills of exchange, drawn by the plaintiff on the defendants, by the style of *James Masterman* and Co. dated the 30th of January, 1798 ; accepted by *James Masterman* only, without the words *and Co.* The partnership commenced in 1795. *James Masterman* carried on a separate trade on his own account, and had had dealings with the plaintiff before his partnership, who had also dealings with the firm. The defence set up to this action was, that the bills were drawn on the separate account, and for the separate concern of *James Masterman* only ; and that the acceptance in question did not bind the partnership, so that an action could be maintained against them, as the acceptors of the bills in question ; and another bill of exchange was produced, drawn in the same style and manner as those in question, but accepted by *Masterman* and Co. which had been paid. Lord *Kenyon* Ch. J. said : “ When a man enters into a partnership, he certainly commits his dearest rights to the discretion of every one who form a part of that partnership in which he engages ; and if a bill is drawn upon the partnership in their usual style and firm, and it is accepted by one of the partners, it certainly binds the partnership to the payment of it : but if a man who has dealings with one partner only, and he draws a bill on the partnership on account of those dealings, he is guilty of a fraud, and in his hands the acceptance made by that partner would be void ; but it would be otherwise in the case of a *bonâ fide* indorsee. In his hands, the acceptance of one of the partners binds the partnership, as he is ignorant of the circumstances under which it was created, and takes it on the credit of the partnership name.”

So, where two partners contract a debt prior to the admission of a third partner, for which the creditor, at the instance of the two, afterwards draws a bill upon the three in the name of the partnership firm ; and the bill is accepted by the two, without the privity of the third, such creditor cannot recover upon it : though if such bill gets *bonâ fide* into the hands of an indorsee, all the partners are liable to him and may be

(y) 2 *Esp. Rep.* 731.

sued thereon. This was settled in the case of *Shirreff* and others v. *Wilks*, (z) which was an action upon the case upon a bill of exchange for 78*l.* dated the 5th of *November*, 1796, payable to the order of the plaintiffs two months after date, which was stated in the declaration to have been drawn by them on the said *G. Bishop*, *W. Robson*, and *J. Wilks*, by the name and description of Messrs. *George Bishop* and Company, and to have been accepted by them. The plaintiffs in *October*, 1795, sold and delivered a quantity of porter to *Bishop* and *Wilks*, who were then partners, which porter was entered in the plaintiffs' books in the names of *Wilks* and *Bishop*; and the same was afterwards shipped for the *West Indies*, and the defendant *Wilks* paid the shipping charges. *Robson* became a partner with *Bishop* and *Wilks* in *April*, 1796, and continued so till the 8th of *November* following, when their partnership was dissolved. The defendant *Wilks* previous to the dissolution of the partnership sent to the plaintiffs a memorandum or calculation in his own handwriting of certain deductions claimed by him in respect of the porter. The balance due to the plaintiffs in respect of the porter was 78*l.* for which the plaintiffs drew upon the defendants the bill mentioned in the declaration, which bill was accepted by *Bishop* in the partnership firm of all the defendants, by his subscribing thereon "Accepted *G. B. and Co.*"

The Court were of opinion that the plaintiffs were not entitled to recover. And Lord *Kenyon* Ch. J. said: "This is an action brought against three persons, *Wilks*, *Bishop*, and *Robson*, as acceptors of a bill of exchange. It appears that the acceptance was in fact made by *Bishop* alone in the name of the firm. The consideration for this bill was some porter which had been sold by the plaintiffs to *Wilks* and *Bishop* only, at a time when *Robson* had no concern with the house. Then the plaintiffs knowing this, drew the bill upon all the three partners, and knowingly take an acceptance from one of them to bind the other two, one of whom, *Robson*, had no concern with the matter, and was no debtor of theirs; no assent of his being found, and nothing stated to show that he had any knowledge of the transactions. It is hard enough for one partner, in any case, to be able to bind another without his knowledge or consent, but it would be carrying the liability of partners for each other's acts to a most unjust extent, if we suffered a new partner to be bound in this manner for an old debt incurred by other persons. The plaintiffs therefore ought not in justice to have taken this security by which they were to bind one who was not their debtor: the transaction is fraudulent upon the face of it. It is no answer to say, that one partner has a general power of binding the rest. So an executor has power to bind the assets of the testator, and to sell and dispose of his effects; and the

(z) 1 East Rep. 48.

law reposes a confidence in him, that he will apply the proceeds in payment of the testator's debts and legacies : but if fraud could be proved in any particular transaction between the executor and a purchaser, such a sale would be void. Nothing can be better established, as a general rule, than that the law will set aside every contract which is fraudulent. Such is the case here. *Wilks* and *Bishop* owed money to the plaintiffs ; these latter, knowing that *Robson* had no concern with the matter, fraudulently receive from *Wilks* and *Bishop* a security by which *Robson* is to be bound : this therefore cannot be enforced in this action."

So, in the case of *Arden v. Sharp and Gilson*, (a) which was an action of *assumpsit* by the indorsee of a bill drawn by *R. Cowan* on one *Rae* at two months after date, in favour of *R. Packer* for 60*l.* dated the 4th of *March*, 1796. The case as proved, on the part of the plaintiff, was, that on the 1st of *March*, the day on which the bill bore date, *Gilson*, one of the defendants, brought the bill in question to the plaintiff, and requested him to discount it ; the plaintiff said he could not do it himself, upon which the defendant *Gilson* answered, he could get it done for him, but wished the business to be kept a secret from his partner *Mr. Sharpe* ; to which the plaintiff assented and took his bill. The witness then proved, that the indorsement "*Sharpe and Gilson*" was in the handwriting of *Gilson*. Lord *Kenyon* Ch. J. said : " This action, under the present proof, cannot be supported ; the bill is indorsed by one partner in the name of the firm ; one partner certainly may indorse a bill in the partnership name, and if it goes into the world, and gets into the hands of a *bonâ fide* holder, who takes it on the credit of the partnership name, and is ignorant of the circumstances, though in fact the bill was first discounted for that one partner's own use ; in such case the partnership is liable ; but the case is different where the party who brings the action was himself the person who took the bill with the indorsement by one partner only, and was informed that the transaction was to be concealed from the other ; he cannot sue the partnership, the transaction indicates that the money was for the partner's own use, and not raised on the partnership account, therefore shall not be allowed to resort to the security of the partnership, to whom in the original transaction he neither looked or trusted." The plaintiff was accordingly nonsuited.

So, an authority given to one partner, on the dissolution of a partnership, to receive all debts *owing to*, and to pay those *owing from* the late partnership, does not authorise him to indorse a bill of exchange in the name of the partnership, though drawn by him in that name, and accepted by a debtor of the partnership after the dissolution. This point

(a) 2 Esp. Rep. 524.

was settled in the case of *Abel and another v. Sutton*, (b) which was an action brought by the plaintiffs, as indorsees, against the defendant, as surviving partner of one *Poynter*, upon a promissory note for 685*l.* 11*s.* dated the 27th of *May*, 1799, and payable six months after date, drawn by Messrs. *Horton and Co.* in favour of *Sutton and Co.* and indorsed in the partnership name of *Sutton and Co.* to the plaintiffs. The defendant and *Poynter* had carried on business in partnership, under the firm of *James Sutton and Co.* On the 31st of *May*, 1799, the partnership had been dissolved, and notice of the dissolution published in the *London Gazette* of the 1st of *June*: and the defence was, that the note in question was an accommodation one, created after the dissolution of the partnership, though it bore date before; and the partnership name put on by *Poynter* alone, without authority from the defendant; or that even if it existed prior to the dissolution, it had not been put into circulation until after. The indorsement, "*James Sutton and Co.*" was in the handwriting of *Poynter*, and it appeared clearly that it had not been made till the 28th of *August*, nearly two months after the dissolution of the partnership: but it was stated, and admitted to be the custom of trade, that when bills or notes had a long time to run, it was not usual to put them into circulation until near the time they became due, or when they had about the usual time of discountable securities to run.

For the plaintiffs it was contended, that where a partnership had been dissolved, and one of the partners had authority given him to settle and liquidate the partnership accounts, and due notice to that effect was given (as in the present case in the same advertisement in the *Gazette* which contained notice of the dissolution of the partnership) such partner had a right to use the partnership name in negotiating bills or securities which existed previous to the dissolution, until the accounts were liquidated: and Mr. *Barnewall*, one of the special jurymen, said, it was very customary for one partner to use the partnership name long after it was notoriously dissolved, in negotiating the partnership securities, for the purpose of liquidating the partnership accounts, and winding up the concern; and observed, that many bills could not be received if the partnership name was not upon them. For the defendant it was argued, that as the declaration stated *Sutton and Co.* indorsed the note, it was necessary to show that the partnership existed at the time the note in question was indorsed; and he cited *Dixon v. Evans*, 6 Term Rep. 57. in support of this position. Lord *Kenyon* Ch. J. said, "If a fair bill existed at the time of the partnership, but is not put into circulation until after the dissolution, all the partners must join in making it negotiable. The moment the partnership ceases, the partners become distinct persons; they are tenants in

(b) 3 Esp. Rep. 108. See also *Kilgour v. Finlayson* and others, 1 H. Bl. 155. S. P.

common of the partnership property undisposed of from that period; and if they send any securities which did belong to the partnership into the world, after such dissolution, all must join in doing so. I even doubt much if an indorsement was actually made on a bill or note before the dissolution, but the bill or note was not sent into the world until afterwards, that such indorsement would be valid."

It was then given in evidence that *Poynter* had received money for securities belonging to the partnership, which had been thrown into the general fund, and had been applied in liquidation of the partnership debts after the dissolution. The counsel for the plaintiffs, in reply, stated two positions in support of the plaintiff's claim; 1st, that if bills existed before the dissolution of the partnership, and one of the partners had authority to settle and liquidate the partnership accounts, such partners had a right to put the partnership name upon such bills; and that a *bonâ fide* holder of such bill would have a right to resort to all the partners: 2dly, that if he put into circulation bills in the partnership names, upon which money had been raised, which was applied in liquidation of the partnership debts, it was money had and received to the use of all the partners, and all would be liable. Lord *Kenyon*, however, (after observing that there was no evidence to show that the money raised upon the bill in question had been so applied) expressed his most decided dissent to both positions: he said, "it could never be allowed that any one might make another his debtor against his will: by that means, a man's greatest enemy, by paying his debts, might make himself his creditor. The most mischievous and distressing consequences might ensue from such a doctrine. He had often ruled that it could not be done; and he was still of the same opinion. With respect to the other position, his Lordship said, when a man takes a partner, he takes him for better, for worse; he reposes confidence enough, and places himself sufficiently in the power of his partner during the partnership. To contend that this liability to be bound by the acts of his partner, extends to a time subsequent to the dissolution, was, in his mind, a most monstrous proposition. A man in that case could never know when he was to be at peace, and retired from all concerns of the partnership, if one partner was to have the power of binding another long after the dissolution of the partnership. I am of opinion, said his Lordship, if a bill is sent into circulation after the dissolution of a partnership, that, beyond all controversy, all the partners must join in the indorsement; and one, by putting the partnership name, cannot bind the rest." The jury accordingly found a verdict for the defendant.

Where two partners give a joint bill of exchange for a partnership demand, which is not paid when due, and the holder takes a *separate*

bill, or security, of one of the partners, without the knowledge of the other, the latter is thereby discharged. (c)

Upon a review of these cases the principle laid down is clear, namely, that in mercantile transactions, in drawing, accepting, and indorsing of a bill of exchange and other negotiable instruments, one partner may bind all the members of firm. And therefore if a bill is drawn upon the partnership in their usual style and firm, and it is accepted by one of the partners, it certainly binds the partnership to the payment of it. In the absence of fraud, an indorsement by one partner, in the name of a partnership binds all the firm. And it is equally binding upon the partnership whether the consideration of the bill, &c. be for the joint or separate account of the partners, provided the person who receives the bill acts *bonâ fide*. For in the case *ex parte Bonbonus*, (d) Lord Eldon, Chancellor, in speaking of the principle upon which the petition in that case was presented, says, "This petition is presented here upon a principle which it is very difficult to maintain; that if a partner for his own accommodation pledges the partnership, as the money comes to the account of the single partner only, the partnership is not bound. I cannot accede to that, I agree, if it is manifest to the persons advancing the money, that it is upon the separate account, and so that it is against good faith that he should pledge the partnership, then they should show, that he had authority to bind the partnership. But if it is in the ordinary course of commercial transactions, as upon discount, it would be monstrous to hold that a man borrowing money upon a bill of exchange, pledging the partnership without any knowledge in the bankers, that it is a separate transaction, merely because that money is all carried into the books of the individual, therefore the partnership should not be bound. No case has gone that length. It was doubted whether *Hope v. Cust*, (e) was carried too far; yet that does not reach this transaction, nor *Shirreff v. Wilks*, (f) as to which I agree with Lord Kenyon; that as partners, whether they expressly provide against it in their articles, (as they generally do, though unnecessarily,) or not, do not act with good faith, when pledging the partnership property for the debt of the individual, so it is a fraud in the person taking that pledge for his separate debt. The question of fact, whether this was fair matter of discount, or being an antecedent separate debt of *Rogers*, the discount was obtained merely for the purpose of paying that debt by the application of the partnership funds, which question is brought forward by the affidavits, though not by the petition, must lead to farther examination. If the partners are privy, and silent, permitting him to go on dealing in this way, without giving notice, the question will be, whether subsequent approbation is not, for this purpose,

(c) 4 Esp. Rep. 91. 5 Esp. Rep. 122.
(d) 8 Ves. 540

(e) Ante, 486.
(f) Ante, 491.

equivalent to previous consent. In *Fordyce's case*, (g) Lord Thurlow and the judges had a great deal of conversation upon the law; and they doubted upon the danger of placing every man with whom the paper of a partnership is pledged, at the mercy of one of the partners, with reference to the account he may afterwards give of the transaction. There is no doubt, now the law has taken this course, that if, under the circumstances, the party taking the paper can be considered as being advertised in the nature of the transaction, that it was not intended to be a partnership proceeding; as if it was for an antecedent debt, *primâ facie*, it will not bind them; but it will if you can show previous authority, or subsequent approbation; a strong case of subsequent approbation raising an inference of previous positive authority. In many cases of partnership, and different private concerns, it is frequently necessary for the salvation of the partnership that the private demand of one partner should be satisfied at the moment; for the ruin of one partner would spread to the others; who would rather let him liberate himself by dealing with the firm. The nature of the subsequent transactions, therefore, must be looked to as well as at the time."

And in *Ridley v. Taylor*, (h) it was determined, that if one partner draw or indorse a bill in the partnership firm, it will *primâ facie* bind the firm, although passed by the one partner to a separate creditor in discharge of his own debt, unless there be evidence of covin between such separate debtor and creditor, or at least of the want of authority, either express or to be implied, in the debtor partner, to give the joint security of the firm for his separate debt. But it was held that no sufficient circumstance appeared in this case to raise any presumption adverse to the separate creditor, taking such joint security, in a case where the bill appeared to have been drawn in the name of the firm, to their own order, eighteen days before the delivery of it to the separate creditor, and to have been accepted and indorsed before such delivery, and to have been drawn for a larger amount than the particular debt; and where, though the indorsement was in fact made by the hand of the debtor partner, yet it did not appear that that fact was known to the separate creditor at the time; and this too in a case where direct evidence might have been given of the covin, or want of authority, if it existed. For the action being brought by the separate creditor against the acceptor, either of the partners might have been called as a witness by the defendant, to disprove the authority of the debtor partner, to give the joint security; for though, if the separate creditor recovered against the acceptor, he would have his remedy over against the firm; yet the innocent partner would have his remedy over against the other; and the bankruptcy of the debtor partner in the meantime does not

(g) Ante, 496.

(h) 15 East. Rep. 175. See also *Henderson v. Wild*, 2 Campb. 561.

vary the question of competency. And Lord *Ellenborough*, Ch. J. said, "*Primâ facie* one partner is bound by the indorsement of another in the partnership firm; but that presumption may be cut down by showing collusion; but the difficulty of the case is, that we have not the facts sufficiently before us to show that collusion. If this were distinctly the case of a pledging by one partner of a partnership security for his own separate debt, without the authority of the other partner; or if there existed in this case evident covin between one partner and the holder of the partnership security, upon which the action is brought, in order to discharge the other partner without his knowledge or consent, either express or implied, for the private advantage of the parties to such covinous agreement, we should have no hesitation to pronounce a bill drawn and indorsed under such circumstances, void in the hands of the covinous holders, upon the principle laid down in the case of *Shirreff v. Wilks*. (i) But upon the facts stated, such does not distinctly appear to us to be the case; nor does it appear that there was any such *crassa negligentia* on the part of the plaintiffs, in not inquiring whether *Ewbank*, the one partner with whom they dealt, was authorised to dispose of this security (which had originally been partnership property) as his own, as to render this transaction on that account fraudulent, and therefore void."

But the authority of one partner to bind another by signing bills of exchange and promissory notes in their joint names is only an implied authority, and may be rebutted by express previous notice to the party taking such security from one of them, that the other would not be liable for it: and this, though it were represented to the holder by the partner signing such security, that the money advanced on it was raised for the purpose of being applied to the payment of partnership debts; and though the greater part of it were, in fact, so applied. Nor can he recover against the other partner the amount of the sum so applied to the payment of the partnership debts against such notice. Thus, in the case of Lord *Galway v. Matthew & Smithson*, (k) where the plaintiff declared on a promissory note made by the defendants and *Whitehouse* deceased on the 16th *December*, 1805, payable sixty days after date to the plaintiff, or order, for 200*l.* value received; and also on the common money counts. It appeared on the trial, that the defendants and *Whitehouse* were partners in a brewery; and on the 16th *December*, 1805, *Matthew* wrote to the plaintiff, alleging the misconduct of his partner *Smithson*, in consequence of which the creditors of the partnership had insisted on the payment of their demands; that there was a certain sum to pay to the excise in a few days, and no resource but to apply to friends, and therefore requesting of the plaintiff to lend him his acceptance for

(i) *Ante*, 491.(k) 10 East, Rep. 264. See also *Rooth v. Quin*, 7 Price's Rep. 193. S. P.

200*l.* at two months, for which he would send him the promissory note of the firm, payable four days before the plaintiff's acceptance became due. In consequence of this the plaintiff agreed to lend his acceptance, and *Matthew* drew the note in question, which was signed by him for himself and his partners. *Matthew* immediately procured the plaintiff's acceptance to be discounted, and applied 180*l.*, of the money to the payment of the partnership debts, reserving the rest for himself. But the note in question not being paid when demanded of the defendants, the plaintiff, after renewing his acceptance to the holder, was ultimately obliged to pay it after *Whitehouse's* death. And now *Matthew* having let judgment go by default, *Smithson* defended the action on the ground that the plaintiff before he took the note in question, had notice of an advertisement then recently published in a newspaper by *Smithson*, wherein he warned all persons not to give credit to the defendant *Matthew* on his (*Smithson's*) account, and that he would no longer be liable for drafts drawn by the other partners on the partnership account. The court determined that the plaintiff could not recover, and a nonsuit was entered: and Lord *Ellenborough* Ch. J. said, "The general authority of one partner to draw bills or promissory notes to charge another is only an implied authority. And that implication was rebutted in this instance by the notice given by *Smithson* who is now sought to be charged, which reached the plaintiff, warning him that *Matthew* had no such authority. It is not essential to a partnership that one partner should have power to draw bills and notes in the partnership firm to charge the others; they may stipulate between themselves that it shall not be done; and if a third person, having notice of this, will take such a security from one of the partners, he shall not sue the others upon it, in breach of such stipulation, nor in defiance of a notice previously given to him by one of them, that he will not be liable for any bill or note signed by the others."

So where persons are partners in a particular and single transaction only, and not general partners, they are not liable even to a *bond fide* holder, on a bill issued by one of them in relation to a different concern. Thus, in the case of *Williams v. Thomas, Hunter, and Latham*, (1) where it appeared, that Messrs. *Leake* and *List* drew a bill for 1500*l.* in favour of the plaintiff, for goods furnished the ship *Cecilia*, in which the defendants were charged as acceptors. The defendants proved, that the acceptance was made by the defendant *Latham* on his own account. The defendants were partners in the ship *Cecilia*, of which the defendant *Thomas*, was captain, and had guaranteed *Leake* and *List* to secure to them the money for the outfit. Lord *Ellenborough* Ch. J. said, "*Leake* and *List* could give no better title to the holder than they had them-

(1) 6 Esp. Rep. 18.

selves; they could not draw for a general account, but for the account of the ship only; they could not bind *Thomas* by drawing a bill upon him, and the other defendants, for an account unconnected with the ship." The plaintiff was accordingly nonsuited.

So, in the case of a discount of a bill of exchange it was determined, in the case of *Emly v. Lye*,^(m) that where one of two partners drew bills of exchange in his own name, which he procured to be discounted with a banker, through the medium of the same agent who procured the discount of other bills drawn in the partnership firm with the same banker; the latter has no remedy against the partnership, either upon the bills so drawn by the single partner, or for money had and received through the medium of such bills; though the proceeds were carried to the partnership account; the money being advanced solely on the security of the parties whose names were on the bills by way of discount, and not by way of loan to the partnership; though the banker conceived at the time that all the bills were drawn on the partnership account.

So, an act of bankruptcy committed by one of several partners, however secret, *ipso facto* determines his power to make use of the name of the firm; and no person can derive any benefit or right of action against the firm, upon any bill or note negotiated by the bankrupt partner. Thus, in the case of *Thomason v. Frere* and others,⁽ⁿ⁾ in which it appeared, that *Thomason*, *Underhill*, and *Guest*, were partners in trade at *Birmingham*, and being indebted to the defendants to the amount of 1800*l.*; and creditors upon *Gamble and Co.* for 1450*l.* *Underhill* and *Guest*, on the 11th October 1807, without the knowledge of *Thomason*, who was then abroad, indorsed to the defendants a bills drawn by *Thomason*, *Underhill*, and *Guest*, upon and accepted by the agent of *Gamble and Co.* for this 1450*l.* *Underhill* and *Guest* had on the 7th of October, 1807, committed acts of bankruptcy, upon which separate commissions issued on the 19th. The bill for 1450*l.* became due on the 6th of December, and was then paid. And to recover this money, the present action was brought by *Thomason* and the assignees of *Underhill* and *Guest*. The house of *Thomason*, *Underhill*, and *Guest*, was still indebted to the defendants beyond the amount of the sum now sought to be recovered. The plaintiffs were nonsuited: but on a rule *Nisi* for a new trial, the Court held, that the indorsement having been made after an act of bankruptcy, though before the issuing of the commission, and though for the purpose of paying a partnership debt, was invalid; and they inclined to think that this action being brought to recover the money received on the bill, which had been thus wrongfully indorsed, the defendants had no right to set off

^(m) 15 East, 7.

⁽ⁿ⁾ 10 East Rep. 418. See *Ramsbottom v. Cater*, 1 Stark. 228.

their demand upon the firm against this claim by *Thomason* and the assignees, and therefore made the rule absolute. So, after an actual dissolution of a partnership duly notified in the *Gazette*, one of the parties accepted a bill in the name of the partnership firm, drawn after the dissolution, but dated before it; it was held, that an indorsee who took the bill without notice of the dissolution, could not enforce the bill against the other members of the firm, and a distinction was taken by the Court between such case, and the case of goods supplied after the dissolution of the partnership, but without notice, by a person who had been in the habit of supplying goods to the firm. (e)

So, the death of a party is in general a revocation of all express and implied authorities given by him. But where A., being member of a partnership consisting of several individuals, drew a bill of exchange in blank in the partnership firm, payable to their order, and having likewise indorsed it in the partnership firm delivered it to a clerk to be filled up for the use of the partnership, as the exigencies of business might require, according to a course of dealing in other instances; and after A.'s death, and the surviving partners had assumed a new firm, the clerk filled up the bill, inserting a date prior to A.'s death, and sent it into circulation; it was held, that the surviving partners were liable as drawers of the bill to a *bonâ fide* indorsee for value, although no part of the value came to their hands. (p)

4. OF BORROWING MONEY, &c.] — Money lent to one partner, whilst he is engaged in the partnership business, in order to defray certain expences of travelling, shall be deemed a partnership debt, and recoverable against all the partners. Thus, in the case of *Rothwell v. Humphreys* and *Howell*, (q) which was an action of *assumpsit* for money lent. The defendants were partners, carrying on the business of linen-draperies in *London*; the plaintiff was a fustian manufacturer at *Manchester*. *Howell*, one of the defendants, had gone down to *Manchester* to purchase goods in the way of his trade, and had, in fact, purchased from the plaintiff to the amount of 500*l*. Being about to return, he borrowed 10*l*. from the plaintiff to defray his expences to *London*; and having drawn a bill on the house in *London* for the amount of the goods, he included in it the 10*l*. so borrowed, and the bill was drawn for 510*l*. Before the arrival of the goods in *London*, *Humphreys* and *Howell*, the defendants, became insolvent; and the plaintiffs stopped the goods *in transitu*; so that the bill was never presented, and the action was brought to recover the 10*l*. lent only. The defence relied upon was, that the action was brought against both partners for a loan of money admitted by the evidence to have been made to one of them, and which therefore could not be supported. But Lord *Kenyon* Ch. J. said, " That

(e) *Wrightson v. Pullan*, 1 Stark. 375.

(q) 1 Esp. Rep. 406.

(p) *Usher v. Dauncey*, 4 Campb. 97.

though the loan of money was to one of the partners; it was lent to him while employed in the partnership business, and on its account; that as such it was competent to him to bind the partnership to the payment of a debt so contracted, and which, in fact, he had done, by including the money lent in the same bill with that for goods sold, clearly on the partnership account." A verdict was accordingly found for the plaintiff. It has also been held, that if a member of a firm is sent abroad to manage the business of the firm and to procure homeward consignments, for which he is to pay by the proceeds of consignments from *England*, and by money raised upon bills drawn by him upon the firm, and he act in pursuance of such directions, the firm is liable for money advanced upon such bills. (r) But where several persons agree to form a partnership, and that each shall contribute a certain share of the capital; and any of the persons borrow or purchase his share, which is by him afterwards brought into the common stock, the liability for payment to the lender or vendor is not joint. (s)

5. OF THE MISAPPLICATION OF MONEY BY ONE OF SEVERAL PARTNERS.] — If one of several partners receiving money or goods of a third person, in the usual course of business, on the partnership account, in order to be applied to a particular purpose, wrongfully misapplies such money or goods to his own private use, all the partners are answerable. Thus, in the case against *Layfield* and others, (t) which was an action on the case for money had and received to the plaintiff's use, it appeared, upon evidence, that *Layfield* and the other defendants were bankers and partners, and that the plaintiff had given *Layfield* 20s. for which he received a ticket in the double exchange lottery, and *Layfield* undertook to pay what benefit should happen thereupon; that the ticket came up a 40*l.* benefit; and for that money the action was brought. It was objected for the defendants, that the action was brought against *Layfield* and his partners; whereas it did not appear that any of them had undertaken to be trustees in the lottery, except *Layfield*, and therefore he only ought to be charged, and not his partners. But *Holt* Ch. J. answered, that it appeared they were partners in their trade, and goldsmiths, and the adventurers put their money in upon the credit of several goldsmiths, that had undertaken to pay the benefits; and it should be presumed the act of *Layfield* was the act of the other, and should bind them, unless they could show a disclaimer, and a refusal to be concerned in it. Accordingly the plaintiff had a verdict for 40*l.*

So, if two persons are in partnership as *attornies* and *conveyancers*, and one of them receives money to be laid out on *mortgage*, but misapplies it, the other is liable for the amount. This was determined in the case

(r) *Denton v. Rodie*, 3 Campb. 496.

(t) 1 Salk. 292. *Holt's Rep.* 434. S. C.

(s) *Vide Saville v. Robertson*, 4 Term Rep. 720.

of *Willet v. Chambers*, (u) which was an action of *assumpsit* for money had and received to the plaintiff's use, brought against the defendant, as *surviving partner* of one *Dadley*. At the trial a verdict was found for the plaintiff, damages 480*l.*: and upon a rule to show cause why a new trial should not be granted, the facts appeared to be as follow: that, prior to any partnership between the defendant and *Dadley*, who was an attorney and conveyancer, at *Coventry*, the latter, in the year 1771, received of a Mr. *Bindley* the sum of 350*l.*, to be laid out on a real security. *Dadley* accordingly furnished him with a mortgage from a Mr. *Hughes* to that amount; which, as it afterwards appeared, *Dadley* had forged. At *Midsummer*, 1776, *Dadley* and *Chambers* entered into partnership; shortly after which *Bindley* wanted to call in his money. The pretended mortgagor was supposed at the same time to want a further sum of 150*l.*, which added to the original mortgage money, made together the sum of 500*l.* The plaintiff, *Willet*, was ready to advance this sum; and, in consideration of his doing so, an assignment was made to him of the pretended mortgage before made to *Bindley*, as to 180*l.* part of this sum of 500*l.* *Willet* paid it into *Dadley's* office to *Chambers*, who gave the following receipt for it: "Received of Mr. *Benjamin Willet*, the sum of 180*l.*, for which I promise to account to him on demand. *Chambers*."

Dadley was not at home when this sum was paid. Some time after, the plaintiff called at the office to pay 300*l.* more, part of the remaining 320*l.* due. *Dadley* being then at home, *Willet* paid the money to him; and in return, *Dadley* gave him the following receipt: "Received on account of Mr. *Benjamin Willet*, 300*l.* the remainder of the money to be paid, being 20*l.* *Dadley*." It was admitted that the defendant, *Chambers*, was in no respect privy to the forgery; and that no procuration money was paid either to *Chambers* or *Dadley*. But the Court refused the rule, and determined this to be a partnership transaction, and that the defendant was answerable for the act of his partner.

So, where one of several partners receives the amount of a parcel of goods sold by him to a purchaser, and afterwards applies the purchase money to his own private use, and the goods are not delivered, all the firm are liable; or the purchaser may sue that one alone at his election. (v)

So, where one of two partners, being a trustee, applied trust money to the use of their joint-trade with the privity of the other partner; and they afterwards separated, and by agreement the partnership effects were assigned over to the first partner, who took upon himself the payment of the joint-debts; this was held to be no payment in discharge of the other partner, but that both were liable to make good the trust-money. (w)

(u) Cowp. 814.

(v) *Hudson v. Robinson*, 4 Maule & Sel. 475.

(w) *Smith v. Jameson*, 5 Term Rep. 601. See also *ex parte Watson*, 2 Vcs. & Beam. Rep. 414.

6. OF THE EFFECT OF SMUGGLING BY ONE OF SEVERAL PARTNERS.] — An action cannot be maintained by several partners for goods sold by one of them living in *Guernsey*, and packed by him in a particular manner, for the purpose of smuggling, though the other partners, who resided in *England*, knew nothing of the sale; for it is a contract by subjects of this country, made in contravention of the laws: and the Court said that the case must be considered in the same light as if all the parties lived in *England*. (x)

7. OF THE LIABILITY OF ALL THE PARTNERS OF A FIRM FOR REPRESENTATIONS AND DECLARATIONS MADE BY ONE OF THEM.] — If one of several partners falsely represent to a customer of the firm, that goods, which had been sent to them for sale, had been actually sold at a profit, and had accounted to the employer for part of the proceeds, all the members are liable to pay the residue of the proceeds. Thus, where A. had employed B. and C., who were partners as wine and spirit merchants, to purchase wine and sell the same upon commission.; C. the managing partner, represented that he had made the purchases, and that he had sold a part of the wines so purchased at a profit; the proceeds of such supposed sales he paid to A. and rendered accounts, in which he stated the purchases to have been made at a certain rate *per* pipe. In fact C. had neither bought nor sold any wine. The transactions were wholly fictitious, but B. was wholly ignorant of that. Upon the whole account a larger sum had been repaid to A., as the proceeds of that part of the wine alleged to be resold, than he had advanced; but the other part of the wine, which C. represented as having been purchased, was unaccounted for. Held, that B. was liable for the false representation of his partner; and that A. was entitled to retain the money that had been paid to him upon these fictitious transactions, as if they were real. Held also, the supposed purchases having been represented to have been made at a certain specified rate *per* pipe, that A. might maintain an action for money had and received to recover the specific sums advanced for the number of pipes of wine unaccounted for. (y)

But the declarations by one of two partners prior to the partnership, is not admissible evidence to charge both jointly. (z)

8. OF EXECUTING DEEDS, AND RELEASING DEBTS, &c.] — One partner cannot bind his co-partner by deed or writing under seal, without an express authority from him by writing under seal. (a) It has however, been determined, (b) that a bill of sale executed by one partner, with the consent and in the presence of the other, is binding

(x) *Biggs v. Lawrence*, ante, 177.

(y) *Ropp v. Latham*, 2 Barn. & Ald. 207.

795.

(z) *Cull v. Howard*, 3 Stark. 23.

(a) *Harrison v. Jackson*, 7 Term Rep.

207.

(b) *Ball v. Dunsterville*, 4 Term Rep.

313.

upon both the partners. And so the release of debts by deed of composition, &c. is said to be an exception to the general rule. (c)

3. OF A CHANGE OR DISSOLUTION OF A PARTNERSHIP :
AND OF THE LIABILITY OF A RETIRING PARTNER EITHER
FOR WANT OF PROPER NOTICE, OR BY SUFFERING HIS
NAME TO BE USED, &c.

Upon a change or dissolution of a partnership by agreement or otherwise between partners, it is the duty of the firm, in order to avoid future liability, to give notice, or send a circular of the fact, to all persons with whom they may have had dealings ; for without such notice, or other proof of the knowledge of the fact, all the partners will remain liable to every person who had prior dealings with them, for all debts subsequently contracted by any of the firm carrying on the same business. And a notice in the *Gazette* will not be sufficient, unless the knowledge of it can be brought home to the individual, who seeks to bind the retiring partner. Thus, in the case of *Graham* and others v. *Hope* and others, (d) where it appeared that the defendants had been in partnership together, and the plaintiff had sold them goods as partners. Afterwards the partnership was dissolved, and notice of the dissolution given in the *London Gazette* ; and after this notice, the plaintiff had sold and delivered the goods, for which the present action was brought. The defendants called witnesses, who swore that a notice had been given to the agent of the plaintiff that the partnership was dissolved. The agent on the contrary positively swore that he had received no such notice. Lord *Kenyon* Ch. J. before whom the cause was tried, told the jury, that " the cause depended entirely on the credit they gave to the witnesses on the one side and the other. The *Gazette*, he thought, was not of itself sufficient notice to the plaintiff of the dissolution of the partnership. His lordship said, he did not say this for the purpose of this cause merely, but meant to lay it down as a general rule to govern the conduct of all men. Many people there were in this kingdom who never saw a *Gazette* to the day of their deaths, and very mischievous would be the consequences, if they were bound by a notice inserted in it. It was incumbent on persons dissolving a partnership, to send notice of such dissolution to all the persons with whom they had dealings in partnership." The jury believing the defendant's witnesses, gave a verdict for the defendant.

But a notice in the *Gazette* of the dissolution of a partnership is a sufficient notice to all persons who have had no previous dealings with

(c) Vide *Hawkshaw* v. *Parkins*,
Swanst. 542.

(d) *Peake's* Cas. N. P. 154. See also
Gorham v. *Thompson*, *Ib.* 42. S. P.

the firm. Thus, in the case of *Godfrey v. Turnbull* and another, (e) which was an action brought by the plaintiff, as indorsee of a promissory note against the defendants as the makers of it. The defendants had been partners in trade, but the partnership had been dissolved prior to the date of the note. And the note was made by the defendant *Macauley* only, after the dissolution of the partnership, who had put their joint names on it without any authority from him. It was dated the 6th of *April*, 1793, but on the 19th of the *March* preceding, notice of the dissolution of the partnership, dated the 15th, had appeared in the *Gazette*. The question was, whether the notice given in the *Gazette* was sufficient, so as to exonerate the defendant *Turnbull*. Lord *Kenyon* Ch. J. said : " In general, if a partner gives a note in the partnership name, all the partners are bound by it ; and that is the case, even if given after the actual dissolution of the partnership, if that was not sufficiently notified, and the party who took the note, took it on the faith of the partnership name. A secret dissolution of a partnership cannot discharge the partners ; but if the dissolution is notified in the ordinary and usual way, as it is the only mode by which the fact of the dissolution can be promulgated to the world, at least to those who have had no previous dealing with the partners, it seems sufficient, at least, to be left to the jury from thence to infer notice. In many cases, notice in the *Gazette* is sufficient to subject a party to penalties, as in the cases of smuggling and out-lawries. So, in the case of bankrupts, notice in the *Gazette* is sufficient for every purpose. In the present instance, there is no proof of any actual notice to Mr. *Godfrey*, the plaintiff, but the publication in the *Gazette* is proved, antecedent to his taking the note. The jury are to judge from the practice in the usual course and ordinary mode of business. Notices are to be found in every *Gazette* of the dissolution of partnerships ; which seems to point out that as the mode adopted by the world for notifications of this sort, and therefore every prudent man in business ought to consult them." The jury, under this direction, found a verdict for the defendant, *Turnbull*.

So if, after a dissolution of partnership, where notice was published in the *London Gazette*, and also a notice or circular was sent round to the customers of the house, one of the partners carries on the business under the old firm, and draws and accepts bills in that firm, the other partners are not bound to apply for an injunction against his doing so, and are not liable upon such bills to a person ignorant of the dissolution of the partnership. Thus, in the case of *Newsome v. Thomas Coles* and three others, (f) which was an action upon the following bill of exchange drawn by *H. Vos*, upon the defendants, under the firm of Messrs. *Thomas Coles* and Sons, dated " *London, 20th March, 1810. Four months*

(c) 1 Esp. Rep. 371. See also *Parkin* (f) 2 Campb. Rep. 617.
v. *Carruthers*, lb. 248.

after date pay to my order 2890*l.* 16*s.* value received. Accepted *Thomas Coles and Sons.*" *Thomas Coles* and his three sons, *William*, *George*, and *Charles*, the present defendants, formerly carried on business in partnership together, under the firm of "*Thomas Coles and Sons.*" The father died in 1805, and the three sons continued to carry on business under the same firm till the year 1808. *George* and *Charles* then withdrew, and established a new business under a new firm. Notice of the dissolution of partnership was published in the *London Gazette*, and was sent round to the correspondents of the house. *William Coles* continued the old business by himself, under the old firm, and accepted the bill in question, drawn upon Messrs. *Thomas Coles and Sons.* The plaintiff had not had any dealings with the partnership of "*Thomas Coles and Sons,*" when composed of the three brothers; and when he took the bill in question, he did not know that the partnership had been dissolved. Lord *Ellenborough* Ch. J. said, "It is not pretended that the defendants *George* or *Charles Coles* ever interfered with the business carried on by *William* after the dissolution of the partnership, or by any act whatsoever authorised him to use the firm under which they had traded together. I am therefore of opinion that they are not liable for that firm, being used by him without their authority. Ample notice had been given of the dissolution of the partnership; and after that it was the duty of persons taking securities in the name of *Thomas Coles and Sons*, to enquire who were designated by that firm. The plaintiff might not know of the dissolution, but he had the means of knowing, and the partners who retired could not remain liable for his ignorance. I think they were not bound to apply to the Lord Chancellor for an injunction, or to take any notice of the firm which their brother might happen to use. They were discharged from all liability for his acts by the dissolution of the partnership, and the notice which was communicated of that event." The plaintiff was accordingly nonsuited.

But in the case of *Williams v. Keats and Archer* (g) which was an action by the indorsees of a bill of exchange against the acceptors: and it appeared that the bill, although bearing the date of *December 23*, 1816, had, in fact, been drawn in the latter end of *February*, 1817, and had been accepted by *Keats*, for the accommodation of *Ambrose*, who knew that the partnership between the defendants had been previously dissolved. *Ambrose* kept it in his possession till *March*, and then negotiated it with the plaintiffs for value. Neither of the defendants had received any value for it. On the 13th of *January*, 1817, it was agreed that the co-partnership between the defendants should be dissolved; and notice was given in the *Gazette* of the 17th of *January*, 1817, announcing that the dissolution had taken place on the 31st of *December* preceding.

(g) 2 Stark. Rep. 290.

No particular notice of the dissolution of partnership was brought home to the plaintiffs, and it appeared that the names of *Keats, Archer, and Co.* remained over the door of the defendant's shop in the *Poultry*, where they had previously carried on business as hatters, till *April*, when *Colman's* name was substituted for *Archer's*. Lord *Ellenborough* Ch. J. was of opinion that it was necessary that the defendants should bring home some notice to the plaintiffs. *Archer* had imprudently suffered notice to be given of the continuance of the partnership, by permitting his name to remain over the door till *April*. Notice in the *Gazette* was not to be considered as notice of the dissolution of partnership to all the world; it was a medium of knowledge, but not equivalent to actual notice. The plaintiffs accordingly obtained a verdict.

If a creditor of a firm holds a bill of exchange accepted by the firm at the time of their dissolution; and afterwards renews the bill by taking the separate notes of one of the late partners, but keeps the original bill, and expressly reserves to himself the right of resorting to all the members of the old firm, they are liable even though the holder renews the bill several times. (h)

4. OF THE PAYMENT OF DEBTS AFTER A DISSOLUTION OF PARTNERSHIP: AND OF THE APPLICATION OF SUCH PAYMENTS.

1. OF PAYMENT OF DEBTS AFTER A DISSOLUTION OF PARTNERSHIP.]

—Where a regular notice of dissolution of partnership is given, and that all debts due to the firm are to be paid to those who remain in the business, specifying their names, a payment afterwards to the outgoing partner is invalid, and a receipt given by him collusively is void. Thus, in the case of *Henderson and Smith v. Wild*, (i) which was an action for goods sold and delivered. The plaintiffs had been in partnership as warehousemen, and sold the goods in question to the defendant, on the 6th of *April*, 1809, and the 1st of *February*, 1810. On the 25th of *October*, 1810, they dissolved their partnership, and on the 27th of the same month published an advertisement in the *London Gazette*, giving notice of the dissolution, and intimating that all debts due to the partnership should be paid to *Henderson* only. On the part of the defendant two receipts signed by the plaintiff, *Smith*, were put in and proved, one bearing date the 21st of *March*, 1810, for the amount of the first parcel of goods; and the other bearing date the 10th *July*, 1810, for the amount of the last parcel. For the plaintiffs it was stated, that no money had passed when these receipts were granted, that the defendant,

(h) *Bedford v. Deakin*, 2 Bern. & Ald. 210.

(i) 2 Campb. 561.

being a tailor, had done business on the separate account of *Smith*, which was attempted to be set off against the goods sold by the partnership; and moreover, that the receipts, although dated in *March* and *July* 1810, had not, in fact, been given till after the partnership was dissolved, and the advertisement had appeared in the *Gazette*. But at whatever time the receipts had been given, as no joint consideration passed to the plaintiffs, it was contended that they were no bar to the action. On behalf of the defendant it was allowed, that the receipts had been given upon a set-off of *Smith's* separate debt against the debt jointly due to the partnership. He denied that, in point of fact, they had been given at a time subsequent to their respective dates; but whensoever given, he maintained the plaintiffs were estopped by them. Here was an acknowledgment of payment under the hand of one of the plaintiffs on the record, who could not pretend that he had signed it ignorantly, or that any fraud or deceit had been practised upon him. Lord *Ellenborough* Ch. J. was of opinion, "That if the receipts had been given *bonâ fide* at the times they bore date, they would have been a bar to the action, though the defendant did not pay the price of the goods for the benefit of both the plaintiffs; but that if they were in reality not given till after the dissolution of partnership, and the advertisement in the *Gazette*, they were to be considered fraudulent and void." The evidence, which was doubtful, being closed, his lordship left it to the jury to say when the receipts had been given. The jury thought that they had been fabricated after the dissolution and advertisement; and therefore by his lordship's direction found a verdict for the plaintiffs, which, upon a motion for a new trial in the ensuing term, was approved of, and confirmed by the Court of King's Bench.

But if after a mere notice of the dissolution of a partnership, and that the remaining partners are entitled to the profit and loss, without an express notice not to pay the outgoing partner, who had relinquished all interest in the concern, a payment is made *bonâ fide* to the outgoing partner, it is valid, and protected both at law and in equity. (k) But if a remaining partner have the exclusive right in equity to all the debts, and a creditor have notice of that exclusive right, a payment to the outgoing partner cannot affect the right of the remaining partner. (l)

If upon a dissolution of partnership, the partners appoint an agent to collect their debts; yet it has been held, that either partner may afterwards countermand the authority, and receive the outstanding debts; and that a payment to either is valid, even though the debtor has promised to pay his debt to the agent. (m)

If two partners dissolve partnership, and one of them agrees to take

(k) *Duff v. India Company*, 15 Ves. 209.

(l) *Ibid.*

(m) *Bristow v. Taylor*, 2 Stark. 50.

upon himself to discharge a joint debt due to A., who also verbally consents and agrees to that arrangement, this is not binding at law upon A. and does not discharge that partner, but both are jointly liable to A. for the partnership debt; there being no consideration for the agreement. (n)

2. OF THE APPLICATION OF PAYMENTS AFTER A DISSOLUTION OF PARTNERSHIP.] — The general rule of law on this subject is, that the party who pays money has a right to apply that payment as he thinks fit. If there are several debts due from him, he has a right to say to which of those debts the payment shall be applied. If he does not make a specific application at the time of payment, then the right of application generally devolves on the party who receives the money. But there is a third rule, viz. that where one of several partners dies, and the partnership is in debt, and the surviving partners continue their dealings with a particular creditor, and the latter joins the transactions of the old and the new firm in one entire account, then the payments made from time to time by the surviving partners must be applied to the old debt. In that case it is to be presumed that all the parties have consented that it should be considered as one entire account, and that the death of one of the partners has produced no alteration whatever. (o) And in conformity to this rule, in the recent case of *Simson v. Ingham*, (p) where a bond was given by country bankers to the several persons constituting the firm of a *London* banking-house, conditioned for remitting money to provide for bills, and for the re-payment of such sums as the *London* bankers might advance on account of persons constituting the firm of the country banking-house, or any of them, associated or not with other persons. One of the partners in the country bank died, a considerable balance being then due to the *London* bankers. It was the course of business between the two houses, for the *London* bankers to send in to the country bankers monthly accounts of receipts and payments. In the month following the death of the deceased partner, the *London* bankers received sums in payment more than sufficient to discharge the balance then due; but during the same time they advanced money on account of the country-bankers to an equal amount. In the first instance the *London* bankers entered in their books all receipts and payments made after the death of the deceased partner to the account of the old firm, but they did not transmit any account to the country bankers until two months after the death of the deceased partner, and then they transmitted two distinct accounts; one the account of the old firm, made up to the day of the death of the partner; and another, a new account, containing all payments and receipts sub-

(n) *Lodge v. Dica*, 3 Barn. & Ald. 611.

(p) *Ibid.* 65.

(o) Per Bayley J. in *Simpson v. Ingham*, 2 Barn. & Cres. 72.

sequent to that time : it was determined, that the entries in the books of the *London* bankers did not amount to a complete appropriation by them of the several payments to the old account ; such appropriation not being complete until it was communicated to the party to be affected by it ; and therefore that the *London* bankers, notwithstanding those entries, were entitled to apply the payments received subsequently to the death of the deceased partner to the debt of the new firm.

The leading authority on this subject, is the judgment pronounced by Sir *William Grant*, whilst Master of the Rolls, in *Clayton's case*, (q) upon an exception to the Master's report in a cause of *Devaynes v. Noble*, (r) where it had been referred to the Master to take an account of what was due at the death of *William Devaynes*, deceased, from the partnership of the said *William Devaynes*, *John Dawes*, *William Noble*, *R. H. Croft*, and *Richard Berwick*, to the plaintiffs, and all such other persons as were creditors of the partnership, at the time of the death of *Devaynes*, and also of what was due, at the time of making the decree, from the partnership to such creditors, and to enquire whether such creditors, or any, and which of them, continued to deal with the surviving partners after the death of *Devaynes*, and what sums of money were paid by the surviving partners to such creditors, respectively, from the death of *Devaynes* to the bankruptcy, and what had since been received by them respectively. And also whether such creditors, or any, and which of them, had, by such subsequent dealings, released the estate of *Devaynes* from the payment of their respective debts, or what (if any thing) remained due in respect thereof.

One class of creditors was represented by Mr. *Clayton*, and consisted of those who after the death of *Devaynes*, continued to deal with the surviving partners both by drawing out and paying in money ; payments being made by the surviving partners before they received any money of the creditors, and the balance varying from time to time, sometimes increased and sometimes diminished, but upon the whole considerably increased by the subsequent transactions. At the death of *Devaynes*, *Clayton's* cash balance in the hands of the partnership amounted to 1713*l.* and a fraction. After the death of *Devaynes*, and before *Clayton* paid in any further sums to his account with the bankers, he drew out of the house sums to the amount of 1260*l.* thereby reducing his cash balance to 453*l.* and a fraction. From this time to the bankruptcy, *Clayton* both paid in and drew out considerable sums, but his payments were so much larger than his receipts, that, at the time of the bankruptcy, his cash balance in the hands of the surviving partners exceeded 1713*l.*, the amount of the cash balance at *Devaynes's* death. By the amount of the dividends received since the bankruptcy, (those dividends being apportioned to the whole debt proved under the commission,) the

(q) 1 Merivale's Rep. 585.

(r) Ibid 530.

balance of 1719*l.* would be reduced to 1171*l.* and a fraction; and it was this last sum which *Clayton* claimed against *Devaynes's* estate, and as to which the master had reported that *Clayton* had, by his subsequent dealings with the surviving partners, released the said estate. An exception was taken to the Report; and after the matter had been argued at great length, and with great ability at the bar, and all the cases on the subject brought into review, the following judgment was pronounced by the Master of the Rolls:—

“ Though the report states the Master's opinion to be that Mr. *Clayton* has, by his dealings and transactions with the surviving partners, subsequent to the death of Mr. *Devaynes*, released his estate from the payment of the cash balance of 1719*l.*, yet the ground of that opinion is, not that the acts done amount constructively to an exoneration of Mr. *Devaynes's* estate, but that the balance due at his death has been actually paid off, and, consequently, that the claim now made is an attempt to revive a debt that has once been completely extinguished. This case has given rise to much discussion, as to the rules by which the application of indefinite payments is to be governed. Those rules we probably borrowed, in the first instance, from the civil law. The leading rule, with regard to the option given, in the first place to the debtor, and to the creditor in the second, we have taken literally from thence. But according to that law, the election was to be made at the time of payment, as well in the case of the creditor, as in that of the debtor. If neither applied the payment, the law made the appropriation according to certain rules of presumption, depending on the nature of the debts, or the priority in which they were incurred. And, as it was the actual intention of the debtor, that would, in the first instance, have governed; so it was his presumable intention that was first resorted to as the rule by which the application was to be determined. But it has been contended that, in this respect, our courts have entirely reversed the principle of decision, and that in the absence of express appropriation by either party, it is the presumed intention of the creditor that is to govern, or at least, that the creditor may, at any time, elect how the payments made to him shall retrospectively receive their application. There is certainly a great deal of authority for this doctrine. With some shades of distinction, it is sanctioned by the case of *Goddard v. Cox*, (s) by *Wilkinson v. Sterne*, (t) by the ruling of the Lord Chief Baron in *Newmarch v. Clay*, (u) and by *Peters v. Anderson*, (v) in the Common Pleas. From these cases, I should collect, that a proposition which in one sense of it is indisputably true; namely, that if the debtor does not apply the payment, the creditor may make the application to what debt he pleases, has been extended much beyond its original

(s) 3 Stra. 1194.

(t) 9 Mod. 427.

(u) 14 East Rep. 239.

(v) 5 Taunt. 596.

meaning, so as in general to authorise the creditor to make his election when he thinks fit, instead of confining it to the period of payment, and allowing the rules of law to operate where no express declaration is then made. There are, however, other cases which are irreconcilable with this indefinite right of election in the creditor, and which seem on the contrary, to imply, a recognition of the civil law principle of decision. Such are, in particular, the cases of *Meggott v. Mills.* (w) And *Dowe v. Holdsworth.* (x) The creditor in each of these cases, elected, *ex post facto*, to apply the payment to the last debt. It was in each case held incompetent for him so to do. There are but two grounds on which these decisions could proceed: either that the application was to be made to the oldest debt, or that it was to be made to the debt which it was most for the interest of the debtor to discharge. Either way the decision would agree with the rule of the civil law, which is, that if the debts are equal, the payment is to be applied to the first in point of time. If one be more burthensome, or more penal than another, it is to it that the payment shall be first imputed. A debt on which a man could be made a bankrupt, would undoubtedly fall within this rule. The Lord Chief Justice of the Common Pleas, explains the ground and reason of the case of *Dowe v. Holdsworth*, in precise conformity to the principle of the civil law. The cases then set up two conflicting rules; the presumed intention of the debtor, which in some instances, at least, is to govern; and the *ex post facto* election of the creditor, which in other instances is to prevail. I should, therefore, feel myself a good deal embarrassed, if the general question of the creditor's right to make the application of indefinite payments were now necessarily to be determined. But I think the present case is distinguishable from any of those in which that point has been decided in the creditor's favour. They were all cases of distinct insulated debts, between which a plain line of separation could be drawn. But this is the case of a banking account, where all the sums paid in form one blended fund, the parts of which have no longer any distinct existence. Neither banker nor customer ever thinks of saying this draft is to be placed to the account of the 500*l.* paid in on *Monday*, and this other to the account of the 500*l.* paid in on *Tuesday*. There is a fund of 1000*l.* to draw upon, and that is enough. In such a case there is no room for any other appropriation than that which arises from the order in which the receipts and payments take place, and are carried into the account. Presumably, it is the sum first paid in, that is first drawn out. It is the first *item* on the *debit* side of the account that is discharged or reduced by the first item on the credit side. The appropriation is made by the very act of setting the two items against each other. Upon that principle, all accounts

(w) *Id.* Raym. 287.(x) *Peake Ni. Pri.* 64.

current are settled, and particularly cash accounts. When there has been a continuation of dealings, in what way can it be ascertained whether the specific balance due on a given day has, or has not, been discharged, but by examining whether payments to the amount of that balance appear by the account to have been made? You are not to take the account backwards, and strike the balance at the head, instead of the foot of it. If appropriation be required, here is appropriation in the only way that the nature of the thing admits. Here are payments, so placed in opposition to debts, that, on the ordinary principles on which accounts are settled, this debt is extinguished. If the usual course of dealing was, for any reason, to be inverted, it was surely incumbent on the creditor to signify that such was his intention. He should either have said to the bankers, — "Leave this balance altogether out of the running account between us," or, "Always enter your payments as made on the credit of your latest receipts, so as that the oldest balance may be the last paid." Instead of this, he receives the account drawn out as one unbroken running account. He makes no objection to it, and the report states that the silence of the customer after the receipt of his banking account is regarded as an admission of its being correct. Both debtor and creditor must, therefore, be considered as having concurred in the appropriation. But there is this peculiarity in the case, that it is not only by inference from the nature of the dealings and the mode of keeping the account, that we are entitled to ascribe the drafts or payments to this balance, but there is distinct and positive evidence that Mr. *Clayton* considered and treated the balance as a fund out of which, notwithstanding *Devaynes's* death, his drafts were to continue to be paid. For he drew, and that to a considerable extent, when there was no fund, except this balance, out of which his drafts could be answered. What was there, in the next draft he drew, which could indicate that it was not to be paid out of the residue of the same fund, but was to be considered as drawn exclusively on the credit of money more recently paid in? No such distinction was made; nor was there any thing from which it could be inferred. I should, therefore, say, that on Mr. *Clayton's* express authority the fund was applied in payment of his drafts in the order in which they were presented. But even independently of this circumstance, I am of opinion, on the grounds I have before stated, that the master has rightly found that the payments were to be imputed to the balance due at Mr. *Devaynes's* death, and that such balance has, by those payments, been fully discharged. The exception must therefore be over-ruled."

So, in the case of *Bodenham & Phillips v. Purchas the elder*, (y) where, after a bond had been given to the several persons constituting the firm

(y) 2 Barn. & Ald. 39.

of a banking-house, conditioned for the repayment of the balance of an account, and of such further sums as the bankers might advance to the obligor; one of the partners died, and a new partner was taken into the firm; and at that time a considerable balance was due from the obligor to the firm; but advances were afterwards made by the bankers, and payments made to them on account by the obligor: the latter was credited by the new firm with the several payments, and charged with the original debt and subsequent advances, as constituting items in one entire account; and the balance due at the time of the partner's death was considerably reduced, and that reduced balance, by order of the obligor, was transferred by the bankers to the account of another customer, who, with his assent, was charged with the then debt of the obligor. The person so charged having become insolvent, the surviving partners of the original firm brought their action upon the bond. But the court of King's Bench determined, that as they had not originally treated it as a distinct account, but had blended it in the general account with other transactions, they were not at liberty so to treat it at a subsequent period; and that having received in different payments a sum more than sufficient to discharge the debt due upon the bond at the time of the death of the deceased partner, that the bond was to be considered as paid.

And in *Newmarch v. Clay*, (z) where the plaintiffs had dealt for a long time with two partners, not knowing that they had a third partner during part of the time, and furnished them with goods, and received payments on account generally, and previous to the time when the secret tri-partnership was dissolved, goods had been furnished, and to cover which, bills had been paid to the plaintiffs by the two ostensible partners, which were dishonoured after the secret dissolution of the tri-partnership, and then other goods were furnished as before, yet as the dishonoured bills were afterwards delivered up by the plaintiffs upon the receipt of the subsequent good bills, which latter were more than sufficient to cover the debts of the tri-partnership, though not to cover, in addition, the goods furnished after the dissolution of it; It was held, that such delivering up of the old dishonoured bills, upon receipt of the new good bills, was evidence of a particular appropriation of such new bills in payment and discharge of the old debt: of which the secret third partner might avail himself in an action on the case for goods sold and delivered, brought against him jointly with the other two partners.

In the case of *Bodenham & Purchas*, (a) *Bayley* Just. observed, "that the decisions in courts of law do not break in upon the distinction

(z) 14 East. Rep. 239.

(a) Ante, 513.

taken in *Clayton's* case, and that the principle established by those decisions is, that where there are distinct accounts, and a general payment, and no appropriation made at the time of such payment by the debtor, the creditor may apply such payment to which account he pleases; but that where the accounts are treated as one entire account by all parties, that rule does not apply." *Abbot Just.* said, "that *Clayton's* case was decided upon great consideration, and was an authority of great weight." And *Holroyd, Just.* added, "that it was decided on the soundest principles, and governed this case.

5. HOW PARTNERS MUST SUE OR BE SUED UPON PARTNERSHIP CONTRACTS, AND AFTER THE DISSOLUTION OF THE PARTNERSHIP BY DEATH OR BANKRUPTCY.

HOW PARTNERS MUST SUE UPON PARTNERSHIP CONTRACTS.]—In actions by a partnership firm for recovery of a joint debt, or for damages for non-performance of any other contract made during the partnership, all the partners in the firm at the time of contracting the debt, or making the contract, whether they continue in partnership or not, must sue and be sued (except in the case of bankruptcy as will be afterwards noticed) the contract or promise being joint. And therefore, if one partner only sues upon a joint contract, the action cannot be maintained; and the defendant may take advantage of this omission at the trial, and nonsuit the plaintiff. But in an action for a *tort* or wrong, this matter can only be taken advantage of by plea in abatement. (b) An action upon a contract, however, must be brought at the suit of such partners only as were in partnership at the time of making the contract. (c) In the case of *Garret v. Taylor*, (d) where three persons had employed the defendant to sell some timber for them, in which they were jointly concerned; he had paid two of them their exact proportions, and they had given him a receipt in full of all demands; the third now brought his action for the remainder, being his share; and it was objected, that as this was a joint employment by three, one alone could not bring his action; but it was ruled by Lord *Mansfield*, that where there had been a severance as above stated, that one alone might sue for his proportionate share.

A secret or dormant partner may be made plaintiff in a suit; though not necessarily so (e): and he need not be joined, if his apparent and ostensible partner represented himself as the sole contractor. (f) So,

(b) Vide 2 Stra. 820. 2 Term. Rep. 382.

(c) 1 Esp. Rep. 182.

(d) *Sittings at Guildhall*, Trin. 4 G. 3. *coram* Lord *Mansfield*, Esp. N. P. 117.

(e) *Lloyd v. Archbottle*, 2 Taunt. 324, 325. *Leveck v. Shaftes*, 2 Esp. Rep. 468.

(f) *Skinner v. Stocks*, 4 Barn. & Ald. 437. 1 Maule & Sel. 249.

nominal partners need not be joined, if they really had no interest in the concern, unless the defendant's rights would be affected. (g) Infants must join in actions brought by their partners, though they cannot be jointly sued with others. (h)

2. HOW PARTNERS SHOULD BE SUED UPON PARTNERSHIP CONTRACTS.]

—In actions against partners, all of them should regularly be sued; though if one be sued alone, he can only take advantage of this omission by plea in abatement; for if he were allowed to give it in evidence upon the trial, and so nonsuit the plaintiff, it would be a great hindrance to justice; for in many instances a creditor does not know all the partners, particularly a secret one. But where the defendant pleads in abatement, he must set forth in his plea the names of all his partners, and the plaintiff is thereby informed against whom he ought to proceed. (i)

And any agreement amongst each other, as to which shall be liable, will have no effect upon a third party: there may, indeed, be some cases in which a change of credit by agreement between the parties, would transfer the liability from the original contracting party to one only of the firm. (k) Secret and dormant partners, or mere nominal partners need not be made defendants in a suit at law. (l) An infant partner should not be joined, (m) but a bankrupt partner at the time of entering into the contract, though he has obtained his certificate, must be joined. (n) If several partners, however, jointly commit a *tort*, the plaintiff has his election to sue all or any of the members, because a *tort* is, in its nature, the separate act of each individual (o); but if the ground of complaint is merely for the non-feazance of a contract, all the partners must be sued. (p)

But where two persons jointly carry on business as partners, but one only appears, and is known in the concern, and is permitted to represent himself to the world as a sole trader, that one shall not be allowed to set up partnership as a defence to an action brought against him only. (q)

3. HOW PARTNERS ARE TO SUE AND BE SUED UPON THE EVENT OF THE DEATH OF ANY OF THEM.]—With regard to surviving partners, it is a rule, that where one of several partners dies, an action upon a partnership contract must be brought in the name of the survivors only; for the executor and the survivors cannot join, because the

(g) 3 Esp. Rep. 238.

(h) 14 East. Rep. 210.

(i) 2 Bl. Rep. 695. 947. 5 Bur. 2612

See also 1 Saund. 291. b. n. 4.

(k) 1 Campb. Rep. 99. n.

(l) 3 Price Rep. 538. 4 Maule & Sel.

475. 7 Term. Rep. 361. n. c. But see
1 Mar. 246. *contra*.

(m) 3 Esp. Rep. 76. 4 Taunt 468.

(n) 2 Maule & Sel. 23. & 444. 6 Taunt.

178.

(o) 5 Bur. 2615. 5 Term. Rep. 649.

(p) 12 East. Rep. 454. 2 New Rep.

454.

(q) 7 Term. Rep. 361.

remedy survives, and in an action by or against a surviving partner, the plaintiff may declare not only for a debt contracted in the lifetime of the deceased partner, but also for a debt due to or from the survivor in his own right. (r) The executor must resort to a court of equity to obtain from the survivor the testator's share of the sum recovered: and where a creditor or other person seeks to recover from a surviving partner a debt, or damages for non-performance of a contract made by him and his deceased partner, the surviving partner alone must be sued, for he cannot be sued jointly with the executor, because one is to be charged *de bonis testatoris*, and the other *de bonis propriis*. (s) And when a surviving partner dies, his executor or administrator is to be made defendant. (t) So, if the contract be several, or joint and several, the executor of the deceased may be sued at law in a separate action. (u)

4. HOW PARTNERS MUST SUE AND BE SUED IN THE EVENT OF BANKRUPTCY OF ANY OF THEM.]—If one of several partners become bankrupt, the solvent partners must sue jointly with the assignees for a joint debt or contract which accrued prior to the bankruptcy. (v) So, where one of several contracting parties against whom there is a cause of action upon a joint contract, becomes bankrupt, the action must be brought jointly against the solvent partner and the bankrupt. (w)

The assignees of A. a bankrupt, and also of B. a bankrupt, under separate commissions, cannot recover in the same action a joint debt due from the defendant to both the bankrupts, and also separate debts due to each: and if, in such an action, the jury have assessed the damages severally on the separate counts, the court will arrest the judgment on those counts which demand the debts due to each bankrupt separately. (x) But where the plaintiff declared as assignees of A. and B., and also as assignees of C., for a joint demand due to all the bankrupts, such declaration was held good on motion in arrest of judgment after verdict. (y)

6. OF THE RIGHT OF SET OFF OF MUTUAL DEBTS.

Joint and separate debts cannot be set off against each other; for the statute (z) only authorizes the setting off of mutual debts; and therefore, as well the debt sought to be recovered as that to be set off, must be due in the same right: but a debt on a joint and several bond, may be set off to an action brought by one of the obligors only. (a) So, a debt

(r) Vide 2 Term. Rep. 476. 5 Term. Rep. 493. 6 Term. Rep. 582. (w) 2 Maule & Sel. 23. 444. 1 Wils. 89.

(s) Carth. 171. 2 Lev. 228.

(t) 3 Brod. & Bing. 302. 9 Co. 89. a. Haywood, 3 Term. Rep. 433.

(u) 2 Burr. 1194, &c. (y) *Streatfield v. Halliday*, Ib. 779.

(v) 10 East. Rep. 418. 12 Mod. 446. (z) 2 Geo. 2. c. 22. s. 13.

3 Term. Rep. 140.

(a) *Fletcher v. Dyche*, 2 Term Rep. 32.

upon a bond purporting to be a joint and several bond, but executed by one only of the obligors, may be set off to an action commenced by the obligor who has executed it. (c) So, a partnership debt due to a defendant as surviving partner, may be set off against a demand on him in his own right, and *vice versa*. (d) So, if a firm be carried on in the name of one person only, a separate debt from that person may be set off either in an action commenced in his own right or in an action commenced by the firm. (e) So, if a person give a note to his bankers for a debt due to them, and the bankers indorse the note to another firm, consisting of some of the partners to the banking-house, the maker of the note may set off any debt due to him from his bankers to an action commenced against him on the note by the firm who hold it. (f) So, if it is agreed between a separate tradesman and the members of a firm, that the separate debts due to him from each member of the firm shall be set off against the joint debt due to him from the firm, and the parties continue their dealing without any express renewal of their agreement, the joint and separate debts may be set off. (g) But a judgment recovered by a separate plaintiff against a firm of two members cannot be set off upon his application, against a judgment recovered against him by the trustees under an insolvent act for one of the defendants. (h)

7. OF CONTRACTS AND PROMISES BY PARTNERS *INTER SE*.

Generally speaking, one partner has no remedy at *law* against his co-partner for any thing relating to the partnership concern, except upon an express contract or promise made between them; the only remedy being in a court of *equity*.

But money paid by one partner to another before the bankruptcy of the latter, for the purpose of being paid over as his liquidated share of a debt to their joint creditor, if it be not so applied, is proveable as a debt under the commission of the bankrupt partner, and also recoverable against the solvent partner; and if the latter be not called upon to repay the debt to the joint creditor till after the bankruptcy of the other, he may recover from the bankrupt partner his share of such debt so paid after the bankruptcy to the joint creditor, notwithstanding he may have obtained his certificate. (i)

So, where A. engages as a partner in a particular transaction with B., C., and D., who were before partners; B., C., and D., become bankrupts, after which A. pays a debt due from himself and them to a joint creditor; it was determined that these three partners constituted but one

(c) *Fletcher v. Dyche*, 2 Term Rep. 32.
See also 2 Bos. & Pul. 338.

(d) 5 Term Rep. 493. 6 Term Rep. 582.

(e) *Stacey v. Decy*, 2 Esp. Rep. 469. n.

(f) *Puller v. Roe*, Peake, 197.

(g) *Kinnerley v. Hossack*, 2 Taunt. 170.

(h) *Doc v. Darnton*, 3 East Rep. 149.

(i) *Wright v. Hunter*, 1 East Rep. 20.

debtor to A., and that he might recover from B. the proportion of B., C., and D., towards the joint debt; B. not having pleaded in abatement. (*k*)

So, where A., B., and C., having dissolved partnership, C., after such dissolution, drew bills in the partnership firm in favour of D., he not knowing of such dissolution; upon which D. brought his action against all the former partners, and C. having pleaded his bankruptcy, D. entered a *nolle prosequi* as to him, and recovered judgment against A. and B., which was afterwards satisfied by the attorney of A. and B., who advanced part, and borrowed the rest of the money on their *joint* credit: it was holden, that the sum so *paid* in satisfaction of the judgment, might be recovered in a *joint* action by A. and B. against C. (*l*)

But where A. and B. are engaged in a partnership in insuring ships, &c., which is carried on in the name of A., and A. pays the whole of the losses, such a partnership being illegal by stat. 6 Geo. 1. c. 18., A. cannot maintain an action against B. to recover a share of the money that has been so paid. (*m*)

Though, if two persons jointly engage in a stock-jobbing transaction, and incur losses, and employ a broker to pay the differences, and one of them, with the privity and consent of the other, repay the broker the whole sum, he may recover a moiety from his companion in an action for money paid to his use, notwithstanding the stat. 7 Geo. 2. c. 8. (*n*)

One partner may maintain an action against his copartner, for money received to the separate use of the former, and wrongfully carried to the partnership account. (*o*)

But where A., B., and C., became partners in insuring ships, (contrary to the stat. 6 Geo. 1. c. 18. s. 12.) and it was agreed that the policies should be underwritten in the name of A. only, several policies were effected, and the premiums received by C. and D. as brokers: it was determined that A. could not recover those premiums from C. and D. (*p*)

Where two persons enter into articles of partnership for a term of years, in which is a covenant to account *yearly*, and to adjust and make a final settlement at the expiration of the partnership, and they dissolve the partnership before the term expires, and account together, and strike a balance which is in favour of the plaintiff, including several *items* not connected with the partnership, and the defendant promises to pay it, an action of *assumpsit* lies on such express promise. (*q*)

If two persons are in the habit of jointly purchasing lots of cattle from the breeders, and afterwards selling them in smaller parcels; and upon

(*k*) *Wright v. Hunter*, 1 East Rep. 20. 3 Term Rep. 418. See also *Yakney v. Osborne* and another v. *Harper*, 5 East Rep. 225. *Reynous*, 4 Bur. 2069.
 (*l*) *Smith v. Barrow*, 2 Term Rep. 476.
 (*m*) *Mitchell and others v. Cockburne*, 2 H. Bl. 379. See also *Aubert v. Maze*, 2 Bos. & Pul. 371. S.P.
 (*n*) *Petrie and another v. Hannay bart.* 479. *Moravia v. Levy*, 1b. 483. n. a.
 (*o*) *Booth and others v. Hodgson* and another, 6 Term Rep. 405.
 (*p*) *Foster v. Allanson*, 2 Term Rep. 479.

the sale of part of a lot, the buyer give them a bill of exchange ; and the remaining part of the lot continues unsold, and the accounts between the joint purchasers are not settled ; and if one of these joint purchasers indorse this bill to the other, who, upon its dishonour, promises to pay the indorsee one moiety, upon his providing for the whole bill, it has been held that he cannot maintain *assumpsit* for such moiety. (r)

If a member of a *London* bank be partner with a country bank, and at the dissolution of the partnership, the country bank be indebted to the *London* bank ; and the *London* house continue, without any alteration in the mode of keeping the accounts, to make advances to the country house, and to receive payments from it ; and after the application, by the *London* house, of the payments received to the debt due at the time of the dissolution, there remains a balance due to the *London* house, *assumpsit* will lie for its recovery. But if one partner is a member of two firms, an action of *assumpsit* cannot be maintained by one firm against the other after the death of such member, for a debt due during his life. (s) If upon the dissolution of a partnership, one of the partners admit a sum to be due from him, an action will lie upon an implied without any express promise. (t) So, it has been ruled, that if upon the dissolution of a partnership, one of the partners admit a sum to be due from him, and offer to pay it, if his copartner will perform a condition ; the copartner may maintain an action on the implied *assumpsit*, without the performance of the condition. (u)

(r) *Robson v. Curtis*, 1 Stark. 78. ; and see *Venning v. Leckie*, 13 East, 7.

(s) *Bosanquet v. Wray*, 6 Taunt. 598. and 2 Mar. 519.

(t) *Rackstraw v. Imber*, 1 Holt, 369.

(u) *Ibid.*

CHAPTER II.

OF CONTRACTS BY MASTER AND SERVANT.

FROM the relation subsisting between master and servant, the subject of the present chapter may be considered under the following heads :

1. WHAT CONTRACTS MADE BY A SERVANT SHALL BIND HIS MASTER.
2. IN WHAT CASES THE MASTER IS ENTITLED TO THE EARNINGS OF HIS APPRENTICE OR SERVANT.
3. OF THE SERVANT'S LIABILITY TO HIS MASTER UPON HIS CONTRACT OF HIRING.
4. OF THE MASTER'S LIABILITY FOR WAGES; AND OF THE DISSOLUTION OF THE CONTRACT OF HIRING.
5. OF THE MASTER'S LIABILITY TO PROVIDE MEDICINE, &c. FOR HIS SERVANT IN SICKNESS; AND ALSO NECESSARIES FOR HIS APPRENTICE.

1. WHAT CONTRACTS MADE BY A SERVANT SHALL BIND THE MASTER.

In general a master is liable for acts done by his servant in the exercise of his official employment. And the reason of this liability is said (a) to arise from the relation subsisting between master and servant ;

(a) Bac. Abr. tit. Master and Servant, K.

for, as in strictness, every one ought to transact his own affairs, and it is by the favour and indulgence of the law that he can delegate the power of acting for him to another, it is highly reasonable that he should answer for such substitute, and that his acts should be deemed the acts of the principal. Therefore where a bailiff or servant hath authority from his master to buy or sell goods, &c. for him, he shall be answerable for the contract made by his bailiff or servant relating to the sale of them. (b) So, where a servant usually buys for the master upon credit, and the servant buys some things without the master's order, yet if the trader trusted the master he shall be chargeable. (c) So, in *Sir Robert Wayland's case*, (d) where it was proved, that he used to give his servant money every *Saturday* to defray the charges of the foregoing week, the servant kept the money; yet *per Holt Ch. J.* "The master is chargeable, for the master at his peril ought to take care what servant he employs; and it is more reasonable that he should suffer for the cheats of his servant than strangers and tradesmen."

And in the case of *Hazard v. Treadwell*, (e) where the defendant, who was a considerable dealer in iron, and known to the plaintiff as such, though they had never dealt together before, sent a waterman to the plaintiff for iron on trust, and paid for it afterwards. He sent the same waterman a second time with ready money, who received the goods, but did not pay for them. It was ruled, that the sending the waterman upon trust the first time and paying for the goods, was giving him credit, so as to charge the defendant upon the second contract.

Again, in the case of *Precious v. Abel*, (f) which was an action for work done as a farrier in shoeing and physicking the defendant's horse: the defence was, that the defendant, by an agreement with his groom, allowed him five guineas a year, for which he was to keep the horses properly shod, and furnish them with proper medicines when necessary. Lord *Kenyon Ch. J.* held, that it was no defence to the action, unless the plaintiff knew of this agreement, and expressly trusted the groom. That if the servant buys things which come to his master's use, the master should take care to see them paid for; for a tradesman has nothing to do with any private agreement between the master and servant.

And in the case of *Gratland v. Freeman*, (g) which was an action of *assumpsit* for beer sold by the plaintiff, a publican, to the defendant. On the trial, it appeared that the defendant had been in the habit of dealing with the plaintiff upon credit, and had paid him occasionally when the bill amounted to a certain sum. After paying up all arrears,

(b) F. N. B. 120. G. See also Doct. and Stud. Dial. 2. c. 42.

(c) 1 Show 95. 3 Salk. 234. Holt's Rep. 460.

(d) 3 Salk. 234. 1 Ld. Raym. 225. See also *Nesby v. Scarlett*, post. 524. S. P.

(e) 1 Stra. 506.

(f) 1 Esp. Rep. 350.

(g) 3 Esp. Rep. 25.

the defendant told the plaintiff's servant, who brought the beer, that he would run up no more bills with the plaintiff, but would pay for the beer as it came in; and the defence was, that he had paid the money to the servant. Lord *Eldon* Ch. J. said, "The defendant must show that the master had notice of this change in the mode of dealing." It was then contended by the counsel for the defendant, that this notice having been given to the plaintiff's servant, and the money having been paid to the servant, the master should be bound by it. But his lordship said, "He thought not. It was a change in the usual mode of dealing suggested by the defendant himself; and as he had personal dealings with the master, in a particular mode, notice to the servant alone of a change in that mode would not be sufficient; the defendant must show that the master himself had notice of it, or he could have no defence to the action." The defendant being unable to establish that fact, the plaintiff recovered the amount of his demand.

But where a man gives his servant money to pay for commodities as he buys them, upon a contract or an understanding between the tradesman and the master to deal for *ready* money; if the servant embezzles the money, the master is not liable. Thus, in the case of *Stubbing v. Heintz*,^(h) which was an action of *assumpsit* for goods sold and delivered. The defendant contracted with the plaintiff to serve him with all kinds of meat at a certain price *per* pound for *ready* money. The cook was accustomed to order the meat, and when the bill amounted to a few shillings or a guinea, used to pay it; in general she paid once a week, on a *Monday* morning; and the defendant always gave the servant the money to pay the bills. This course of dealing continued for a long time, and several successive servants paid the money they received from the defendant as above stated. At length the defendant got another cook, and gave her money as usual, but she did not pay the bills as the others had done, but suffered them to be in arrear 33*l.* 3*s.* 3*d.* She then ran away from the defendant's house, after which the defendant was called upon, for the first time, to pay this sum of money, and on his refusal, the plaintiff brought the present action. The defendant also proved, that when his family were absent from town in the summer, a servant, who was left to take care of the house, had meat for her own support from the plaintiff, and paid him for the same, but he never demanded this sum of money from that servant, or mentioned to her that it was owing to him from the defendant. Lord *Kenyon* Ch. J. said, "Nothing could be clearer than that where a man gives his servant money to pay for commodities as he buys them, if the servant pockets that money, the master will not be liable to pay it over again. But if the master employs his servant to buy things on credit, he will be liable to

(h) *Peake's Cas.* N. P. 47. See also 1 *Show.* 95. S. P.

whatever extent the servant shall pledge his credit. Here the contract between the parties was to deal for ready money : and the plaintiff when he let the bill run on to such an amount as the sum now claimed, was giving credit to the servant, and not to the defendant. The defendant had not entered into a new contract, but still thought that he was dealing on the same terms as before." A verdict was accordingly found for the defendant.

So, in the case of *Pearce v. Rogers*, (i) which was an action brought by the plaintiff, who was a publican, to recover from the defendant the amount of a score for beer, supplied the defendant's family. The defendant dealt with the plaintiff for the porter used in his family, and was in the habit of paying ready money to the plaintiff for a certain quantity of porter which was allowed for the family; and, in fact, though the beer for which the action was brought had been delivered at the defendant's house, it had been carried in clandestinely by the maid servant, for her own use, and that of the defendant's wife's mother; but it did not appear that the plaintiff knew of this circumstance. Lord *Eldon* Ch.J. said, "that to allow such a demand would be to put it in the power of servants and tradesmen to ruin the master; but where the master was in the habit of paying ready money for part of the goods furnished, it was sufficient notice to the tradesmen that he considered those only as furnished to his family, to put the tradesman on his guard, and to make it incumbent on him to satisfy himself that the goods were really for the use of the master's family; that where the tradesman suffered his goods to be so delivered, and without informing the master, if in point of fact they did not come to his use, he should hold him not to be liable: that in this case, the porter not having been delivered to the defendant's use, there was, in his opinion, no pretext to charge him." The plaintiff was accordingly nonsuited.

So, where a tradesman had had no dealings with the master, but with the coachman, to whom the master gave money monthly for the purpose of buying oats and hay for his horses; and the tradesman made no application to the master for his demand until a year after the goods were delivered, Lord *Kenyon* Ch.J. ruled, that the master was not liable. (k)

But in the case of *Rusby v. Scarlett*, (l) which was an action brought to recover the price of a quantity of hay and straw sold by the plaintiff for the use of the defendant's horses. The plaintiff proved the delivery of a quantity of hay and straw at the defendant's stables, and the delivery of bills of parcels; but there was no evidence of his having ever seen the defendant, or of his having ever received any orders from him, or that he ever received from him directly any payment or money

(i) 3 Esp. Rep. 214. See also *Maunder v. Conyers*, 2 Stark. Rep. 281.

(k) Esp. Ni. Pri. 115. 5d ed. See also *Maunder v. Conyers*, 2 Stark. 281. S.P.

(l) 5 Esp. Rep. 76.

whatever. And the defence was, that the defendant had given money to his coachman to pay the bills, which he had embezzled. It appeared that the defendant had kept a book with the servant; in which were entered the articles procured by the servant, and the sums advanced to him; but there did not appear to be any connection between the sums advanced to the servant, and the demands which he was to pay; but the money was advanced generally. Lord *Ellenborough* Ch. J. said, "The general rule to subject the principal to the act of the agent is this.—The agency must be antecedently given, or be subsequently adopted. There must, in the latter case, be some act of recognition; but if I authorise a man to obtain credit on my account, and he gets the goods on such credit, unless I have paid him, I am myself liable: but I go further; for if the goods were taken up, and the money given afterwards to the servant to pay, I am inclined to think the master liable, if the servant has not paid over the money; for he has given the servant authority to take up goods on credit. It is therefore material to see when the money was given. If the servant was always in cash beforehand to pay for the goods, the master is not liable, as he never authorised him to pledge his credit; but if the servant was not so in cash, he gave him a right to take up the goods on credit; and I think he would be liable, as the servant has not paid the plaintiff, though he might have received the money from the defendant, his master."—The jury accordingly found a verdict for the plaintiff.

But where a master forbids a tradesman to deliver any goods except his servant pays for them, and goods are afterwards delivered to the servant upon credit; the master shall not be liable, if he has paid the servant the money for them.^(m) So, in the case of *Hiscox v. Greenwood*,⁽ⁿ⁾ which was an action of trover; it appeared, that the plaintiff's chaise having been damaged by the negligence of his servant, and without his knowledge, the servant had, without acquainting his master, taken the chaise to the defendant, who was a coachmaker, to get it repaired: the defendant had never been employed by the plaintiff as his coachmaker, or to do any work for him. Some repairs had been done to it to a very small amount. The defendant refused to deliver it up till he was paid the amount of his demand, contending that he had a lien on the chaise, on account of the work which he had done to it. But Lord *Ellenborough* Ch. J. said, "that the defendant had no right to hold the chaise as a lien. Whatever claim of that sort he might have, he must derive it from legitimate authority: that unless the master had been in the habit of employing the tradesman in the way of his trade, it should not be in the power of the servant to bind him to contracts of which he had no knowledge, nor to which he gave his assent. It was

(m) Brownl. 64.

(n) 4 Esp. Rep. 174.

the duty of the tradesman, when he was employed, to have enquired of the principal if the order was given by his authority; but having neglected to do so here, and the master having never employed him, the master was not liable to the demand; and the detainer of the chaise was unlawful."

If a servant, entrusted to sell a horse for his master, warrant him sound, the master is bound by such warranty, even though the servant had express orders from his master not to give a warranty; for the servant at the time of the sale and warranty is acting within the general scope of his employment; and all acts so done will bind the master; and such acts cannot be controlled or limited by any private order or direction of the master not known to the party dealing with the servant. But if the owner of a horse send a *stranger* with it to a fair to sell, and expressly directs him not to warrant the horse, and the latter act contrary to the orders, the purchaser can only have recourse to the man who actually sold the horse, and the owner is not liable on the warranty. (o)

So, where a merchant sent his servant, who had been used to transact affairs of that nature for him, with a note drawn upon S. E., with orders to get either bank bills or money, and turn them into exchequer bills; the servant, instead of doing so, got B. to give him a bank bill for it, with which he bought exchequer bills, and carried them to his master; and before the bill upon S. E. was paid, S. E. broke. The question was, whether the loss should fall upon B. or upon the merchant. At the trial, *Parker* Ch. J. was first of opinion that it should fall upon B., because the servant acted directly contrary to his master's orders, and B., by furnishing the servant with a bank bill, did the master no service at all, for if he had not, the servant must have gone and received the money himself from S. E.; and he referred to the case of *Ward v. Evans*, (p) in which he said that it had been decided that a servant sent to receive money could not bind his master by receiving a bill; but upon the suggestion of one of the jury, that whether a servant who was used to act upon the credit of his master, went against his orders in a particular instance, was a fact that could not be known to a third person, he altered his opinion, and a verdict was given against the master, which was afterwards attempted to be set aside. But the Court were all of opinion that it was right, and that the master was chargeable; for a servant, by transacting affairs for his master, does thereby derive a general authority and credit from him; and if this general authority should be liable to be determined for a time by any particular in-

(o) Per Ashhurst Just. in *Fenn v. Harrison*, 3 T.R. 761. See also 2 Campb. Rep. 555. 3 Esp. Rep. 64. See also Dow's Rep. 44. and 15 East Rep. 45. S.P.

(p) Ante, 278.

structions or orders, there would be an end of all dealing but with the master. (q)

2. IN WHAT CASES THE MASTER IS ENTITLED TO THE EARNINGS OF HIS APPRENTICE OR SERVANT.

Whatever an apprentice earns by his labour, whilst he remains in the actual employ of the master, clearly belongs to the master. So, where an apprentice leaves his master's service, and is employed by a stranger, the master is entitled to his wages or earnings, in respect of such employment during his apprenticeship. Thus, in the case of *Barber v. Dennis*, (r) where it appeared that the plaintiff had her apprentice taken from her, and put on board a Queen's ship, where he earned two tickets, which came to the defendant's hands, and for which the plaintiff brought trover. It was agreed the action would well lie, if the apprentice were a legal apprentice, for his possession would be that of his master, and whatever he earns shall go to his master. *Holt* Ch. J. said, he would understand him an apprentice or servant *de facto*, and that would suffice against the defendant being a wrong doer.

So, in the case of *Eade v. Vandeput*, (s) which was an action against the captain of a ship of war by the master of an apprentice, to recover wages for the service of his apprentice, who, having been impressed, was detained on board the defendant's ship. The only witness to charge the defendant with knowledge was the apprentice boy himself, who swore that after he had been impressed and carried on board the ship, he told the defendant, the captain, that he was an apprentice, and required his discharge, which was refused. The Court were of opinion that the evidence of the boy was sufficient, and that the captain ought to have made enquiry into the truth of what the boy said; for after that information he detained him at his peril; and it was admitted that if the indentures had been produced, the defendant would have been bound to have discharged the boy.

So, in the case of *Curtis v. Bridges*, (t) it was held, that if the master of one ship takes a servant that belongs to the master of another ship, whatever wages he receives from the King upon his account shall be to the use of his first master, being acquired by the labour and industry of his servant.

But though the master is clearly entitled to the earnings of his apprentice, it may be doubted whether the same rule applies to the case of hired servants. All the cases which occur in the books relate to

(q) *Nickson v. Brohan*, 10 Mod. 109. See also *Thorold v. Smith*, 11 Mod. 8.

(r) 6 Mod. 69. 1 Salk. 68. S. C.

(s) Mich. 25 Geo. 3. B. R. 5 East Rep. 39. n. a.

(t) Comb. 450. See also *Lightly v. Clouston*, 1 Taunt. 112. where it was determined that an action of *indebitatus assumpsit* for work and labour will lie in such case.

apprentices only. It is, however, observed, (u) with regard to *hired servants*, that the master's proper remedy in all cases, except those in which the servant is intentionally employed on his master's account, seems to be an action either against the employer for loss of service, if he knew of the first retainer, or against the servant himself for breach of his contract, such a case rather importing the master's right to damages for the injury sustained by the consequences of the second retainer, than a right to the profits accruing from the employment.

3. OF THE SERVANT'S LIABILITY FOR BREACH OF HIS IMPLIED UNDERTAKING TO SERVE HIS MASTER WITH DILIGENCE AND FIDELITY, &c.

Upon every contract of hiring there is an undertaking implied on the part of the servant, that he will serve his master with care, diligence, and fidelity; so that wherever the master sustains an injury by reason of any negligence or misconduct on the part of his servant, the former may maintain an action against the latter, either of *assumpsit*, or on the case in *tort* to recover a compensation by way of damages for breach of his duty. Thus, if A. is employed by B. to sail from *England* to the *Indies*, and A. covenants, that he or his servants will not thence import any calicoes, &c., and A. retains C. as his servant in this voyage, and acquaints him with the covenants, and notwithstanding C. falsely and fraudulently brings thence certain calicoes, &c., A. shall have an action against C., for though no action lies by a master for the bare breach of his command, yet if a servant does any thing falsely and fraudulently, to the damage of his master, an action will lie. (v)

So, if a merchant's servant takes his master's goods that are arrived at a port in *England*, and before payment of the customs, lands them, *per quod* the goods are forfeited and seized by the king; the master may have an action of trespass upon the case against his servant. (w) And if a servant drives his master's cart, and by his negligence suffers the cattle to perish, an action upon the case lies against him. (x) So, if a man deliver a horse to his servant to go to market, or a bag of money to carry to *London*, which he neglects to do, the master may have an action of *account* or *detinue* against him: or, he might now maintain an action of *assumpsit* for breach of his implied promise. (y) But if a man delivers money to his servant to carry to such a place, and he is robbed, the servant shall not answer for it; for a servant only undertakes for his diligence and fidelity, and not for the strength and

(u) Co. Lit. 117. a. n. 1. Bac. Abr. tit. Master and Servant.

(v) 1 Sid. 298. 1 Lev. 188.

(w) Cro. Jac. 265. Lane 65.

(x) 7 H. 4. 14. Bro. tit. Action sur. case 34.

(y) Vide 21 H. 4. 14. Moor 248.

security of his defence, and therefore shall not be obliged to preserve his master's property at all adventures. (z)

4. OF THE CONTRACT BETWEEN MASTER AND SERVANT FOR WAGES ; AND OF THE SERVANT'S RIGHT TO A MONTH'S WARNING, &c.

If a person retains a servant, and agrees to pay him so much by the day, month, or year, the servant may have an action against the master on the contract, or against his executors ; for every such retainer will be presumed to be in consideration of wages, unless the contrary appears. (a) So, if a man be retained in *London* to serve beyond sea, he may have an action for his wages in *England* ; and lay the venue in any county. (b)

Where a person is hired as an assistant, or deputy, to perform the duties of a particular office, at a certain yearly salary, and the principal is afterwards appointed to another situation, and he employs the same person to transact the business of both offices, the assistant is not entitled to any increase of salary without some agreement or promise of the principal. Thus, in the case of *Bell v. Drummond*, executor, &c. (c) which was an action of *assumpsit* for work and labour done and performed by the plaintiff for *Paterson*, the defendant's testator ; it appeared that the testator was clerk to the commissioners of the land-tax, and that the plaintiff had done the business of his office at a salary of 100*l.* a year : that afterwards, on new duties being imposed, the testator was appointed clerk to the commissioners of those duties, and the plaintiff also transacted that business, but no agreement had been made as to any increase of salary, though the labour of the office was considerably increased. It was proved, that the plaintiff having demanded an additional stipend, the testator had desired the witness (as a friend to both parties) to consider what ought to be allowed the plaintiff. That accordingly the witness did proceed to make an estimate ; but before he had finally made up his mind the testator died. Lord *Kenyon* Ch. J. said, " that had the plaintiff's case rested wholly on the fact of the new duty being imposed upon him, he should not think it such a case as would have entitled him to come into a court of justice for an additional stipend on a *quantum meruit* ; if it was, every porter in a shop, or clerk in an office, would, upon an increase of his master's business, be equally entitled to demand an increase of wages. But upon the evidence produced, it appeared clearly that the testator himself thought that he ought to pay something, and the only matter in controversy between

(z) Bac. Abr. tit. Master and Servant, H.

(a) Ibid.

(b) Brownl. 54.

(c) Peake's Cas. N. P. 45.

him and the plaintiff was the *quantum* of the additional allowance." The plaintiff obtained a verdict.

If a slave comes over from the *West Indies*, and continues in the service of his master in *England*, he is not entitled to wages, unless there has been some agreement or contract of service for wages. Thus, in the case of *Alfred v. Marquis of Fitzjames*, (d) which was an action of *assumpsit* for servant's wages. It appeared in evidence, that the plaintiff came over from *Martinique* with the Dutchess of *Fitzjames*. His father and mother had been slaves on an estate belonging to her in that island. He had entered into her service in *Martinique* before her marriage with the Marquis, and continued to serve her after her marriage; and the Marquis found him with necessaries of every description. There was no contract for any hiring for wages; but a witness said, that the Marquis had been heard to promise to pay him wages. Lord *Kenyon*, Ch. J. said, "It was his decided opinion, that up to the time of the promise to pay wages, which the witness had said the defendant had made, the plaintiff had no title to recover, as there was no original contract of service for wages."

A contract to pay a certain sum *per annum*, in consideration of services to be performed, is an entire contract for a year, and without a full year's service, the servant is not entitled to any part of his salary. This was settled in the case of *The Countess of Plymouth v. Throgmorton*, (e) which was an action of debt, wherein the plaintiff declared upon a writing, whereby the defendant's testator had appointed the plaintiff's testator to receive his rents, and promised to pay him 100*l.* *per annum* for his service, and shows that the defendant's testator died three quarters of a year after, during which time he served him, and demands 75*l.* for the three quarters; judgment for the plaintiff in C. B. by *ad dictum*. But upon error brought in K. B. the judgment was reversed; it being held, that without a full year's service nothing could be due, and that it was in nature of a condition precedent.

But with regard to the common case of an hired servant, it is said, (f) that such a servant, though hired in a general way, is considered to be hired with reference to the general understanding upon the subject, that the servant shall be entitled to his wages for the time he serves, though he do not continue in the service during the whole year. So, if a master turns away his servant without a previous notice or warning, (except for misconduct) the servant is entitled to a month's wages.

Thus, in the case of *Robinson v. Hendman*, (g) which was an action of *assumpsit* brought by the plaintiff to recover the amount of a month's

(d) 3 Esp. Rep. 3.

(e) 1 Salk. 65. 3 Mod. 153. S. C. See also 6 Term Rep. 320. S. P. 3 Vin. Abr. tit. Apportionment, fo: 8.

(f) Per Lawrence, Just. 6. Term Rep.

326.

(g) 3 Esp. Rep. 235. See also, 1 Stark. Rep. 198. 4 Campb. 375.

wages, on the ground of his having been discharged by the defendant, without any notice or warning. No agreement was proved to the effect of the claim; but general usage only was relied on. The defendant proved that the plaintiff was negligent in his conduct, frequently absent when his master wanted him, and often slept out. Lord *Kenyon*, Ch. J. said, "that though in the present case he thought the plaintiff was not entitled to recover on account of his misconduct, he was of opinion, that if a master turned away his servant without warning, or previous notice, and there was no fault or misconduct in the servant to warrant it, he ought to have the allowance claimed, of a month's wages; which he thought reasonable." (k)

5. OF THE MASTER'S LIABILITY TO PROVIDE MEDICINE &c. FOR HIS SERVANT IN CASE OF ILLNESS; AND ALSO NECESSARIES FOR HIS APPRENTICE.

1. OF THE MASTER'S LIABILITY TO PROVIDE MEDICINE, &c.] — Different opinions have been held upon this subject; and but three cases appear in print. In two of them it was determined that a master is not bound to provide medical attendance, &c. for his servant, who meets with an accident in his master's service. In the other, which was tried before Lord *Kenyon* Ch. J. it was ruled, that a master was liable for medicines furnished to his servant whilst in his service. The two former cases, it should be observed, were argued and determined in the courts of *Westminster-Hall*; the latter was only a determination *à nisi prius*. I shall, however, present them to the reader in the order in which they were determined.

The first is, *Newby v. Wiltshire*, (i) which was *assumpsit* for money paid, laid out, and expended for the defendant's use. The case for the opinion of the court stated, that the defendant, a farmer, sent his waggon, in May 1784, to *Cambridge*; and in returning, a boy that had been sent with it fell from the shafts and broke his leg: that the boy could not be removed out of the parish where the accident happened on account of the danger it might occasion: that the plaintiff was overseer of the parish where the accident happened, and took the charge of getting the boy cured upon himself: that it was necessary to cut off the leg; and the overseer expended in and about the cure, 32*l.*: that afterwards the boy served the remainder of the year with his master; and the action was brought to recover from the defendant the expences of the boy's cure. Lord *Mansfield* Ch. J. said, "I don't applaud the humanity of the master in this case; he does not enquire after his servant for six weeks after the accident; and when he does,

(A) See also *Spain v. Arnott*, 2 Stark. (i) Easter Term 25. G. 3. K. B. 2 Esp. Rep. 256. Rep. 759.

‘he passes by on the other side.’ I think, in general, a master ought to maintain his servants, and take care of them in sickness; but the question now is, what is the law? There is, in point of law, no action against the master to compel him to repay the parish for the cure of his servant: no authority whatsoever has been cited; and it seems to me that it cannot be. The parish is bound to take care of accidents; they do their duty in that respect: therefore I am inclined to think that the plaintiff cannot recover.” The other judges concurred in this opinion, and the Court gave judgment for the defendant.

The second reported case on this subject, is, *Scarman v. Castell*,⁽ⁱ⁾ which was an action to recover the amount of an apothecary’s bill for medicines furnished to, and attendance on a servant of the defendant, while living under his roof. The plaintiff, an apothecary, attended the servant in the house of the defendant, who was a man of large fortune, but it was not proved that the plaintiff was expressly employed by the defendant; and therefore it was contended that the plaintiff could not recover against the master. But Lord *Kenyon* Ch. J. said, “that he was of opinion that a master was obliged to provide for his servant in sickness and health, and that he, therefore, was liable for medicines furnished to his servant, while in his service. Not that his servant was at liberty to go abroad and contract debts for medicines, but that while he was under his master’s roof, the master was under a legal, as well as a moral obligation to provide the necessary medicines, and to pay for such as were administered to his servant under such circumstances.” The counsel for the defendant then cited the case of *Newby v. Wiltshire*; but it was answered by the plaintiff’s counsel that the case cited was of a servant in husbandry. Lord *Kenyon* said, that that case was distinguishable from the present. He therefore directed the jury to find a verdict for the plaintiff, which they did to the full amount of the plaintiff’s bill.

But, in the case of *Wennall v. Adney*,^(k) which was also an action of *assumpsit* to recover the amount of a surgeon’s bill. The cause was tried before *Le Blanc* J. at *Shrewsbury* assizes, when it appeared that the action was brought to recover 8*l.* 18*s.* 6*d.*, the amount of a bill for medical attendance upon a servant of the defendant, who had his arm broken while driving the defendant’s team, and who had been hired by the defendant at the yearly wages of 3*l.* 10*s.* and victuals; that the accident happened nearer the house of the servant’s mother than that of the defendant, and that he was taken to his mother’s house; that the accident happened in one parish, that the house of the servant’s mother was situated in another, and the defendant’s in a third; that the plaintiff,

⁽ⁱ⁾ *Sittings at West. after Hil. Term.* ^(k) *Mich. Term. 45. G. 3. C. B. 5 Bos. 35 G. 3. K. B. Coram Lord Kenyon Ch. & Pul. 247.*
J. 1 Esp. Rep. 270. and cited in 5 Bos. & Pul. 248.

who was the surgeon usually employed by the defendant, accidentally passing near the mother's house, was called in, and desired to attend her son; at which time nothing was said about the defendant paying for his attendance, but the mother observed that she had always been able to pay her way, and hoped she should do so still; that during the time of the servant's confinement he was supplied with victuals from the defendant's house; that the plaintiff first delivered his bill to the defendant, but afterwards called a meeting of the parishioners of the parish in which the mother's house was situated, and submitted it to them for payment, who refused to discharge it. The learned judge being of opinion that the defendant, not having employed the plaintiff, or made any promise of payment, was not liable, nonsuited the plaintiff. The case afterwards came before the Court of Common Pleas upon a rule *nisi* for setting aside the nonsuit; and, after argument, the Judges delivered their opinions *seriatim*, that the action would not lie; and the Court discharged the rule.

2. OF NECESSARIES PROVIDED FOR APPRENTICES.]—A master is bound to provide necessaries for his apprentice. But in an action for necessaries provided for an apprentice, if the declaration states "that the defendant is indebted, &c. to the plaintiff for meat, drink, &c. furnished to the defendant's *apprentice*," the plaintiff must prove him to be legally an apprentice; and if the indenture of apprenticeship has not been legally stamped, the plaintiff cannot recover on those counts so laid. Thus, in *Aldridge v. Ewen*, (1) which was an action of *assumpsit* brought to recover a sum of money for the board and lodging of a son of the plaintiff, whom he alleged he had bound apprentice to the defendant. The plaintiff had notice to produce the indenture of apprenticeship. A witness proved, that he had been employed to prepare it, and that it was suggested, it would save expences to have it executed at *Perth* in *Scotland*: that it was prepared and brought from *Perth*, and was, in fact, executed at *Wapping* by the plaintiff; but that there was no stamp to it. For the defendant, it was contended that the plaintiff must be nonsuited, as he had not proved any legal apprenticeship of the person for whose board and lodging the plaintiff sought to recover. To this the counsel for the plaintiff answered, that he could prove the defendant having taken the young man as an apprentice, and of his having served the defendants in that capacity; and that that would satisfy the averment in the declaration. But Lord *Kenyon* Ch. J. said: "The plaintiff declares on a contract for necessaries furnished to the defendant's apprentice; and this is so stated in the declaration. To entitle the plaintiff to recover, therefore, it must appear, that the relation of master and apprentice legally subsisted between the parties,

(1) 5 Esp. Rep. 188.

as it is in that character only the defendant is charged. This has not been made out by the plaintiff. An apprentice can only be bound by indenture; that indenture must be legally stamped. The articles of apprenticeship in this case appear to have been prepared at *Port* and executed at *Wapping*, and to have no legal stamp. They are, therefore, void; and the plaintiff has failed in proving this necessary averment, and cannot recover."

CHAPTER III.

OF CONTRACTS WITH A FACTOR, BROKER, OR AGENT, ON BEHALF OF HIS PRINCIPAL ; AND OF THEIR RESPECTIVE LIABILITIES.

IN mercantile dealings and transactions between merchants, contracts for the sale and disposition of merchandize, are most commonly entered into through the intervention of factors, brokers, or agents : and when these persons act within the scope of the authority committed to them, their principals are bound by such contracts as they may enter into. There is a material difference between a *factor* and *broker*, not in name only, but in many important particulars ; and the distinction between the two was very much considered and explained in a recent case of *Baring v. Corrie*, in which the Lord Chief Justice *Abbott* observes, (a) “ A *factor* is a person to whom goods are consigned for sale by a merchant residing abroad, or at a distance from the place of sale, and he usually sells in his own name, without disclosing that of his principal ; the latter, therefore, with full knowledge of these circumstances, trusts him with the actual possession of the goods, and gives him authority to sell in his own name. But the *broker* is in a different situation ; he is not trusted with the possession of the goods, and he ought not to sell in his own name. The principal, therefore, who trusts a broker, has a right to expect that he will not sell in his own name.” And Mr. Justice *Holroyd* in the same case says, “ That a *factor* who has the possession of goods, differs materially from a broker : the former is a person to whom goods are sent or consigned, and he has not only the possession, but in consequence of its being usual to advance money upon them, has also a special property in them, and a general lien upon them. When, therefore, he sells in his own name, it is within the scope of his authority ; and it may be right, therefore, that the principal should be bound by the consequences of such sale ; amongst which, the right of setting off a debt due from the factor is one. But the case of a

(a) 2 Barn. & Ald. 142.

broker is different; he has not the possession of the goods, and so the vendee cannot be deceived by that circumstance; and besides, the employing of a person to sell goods as a broker does not authorize him to sell in his own name. If, therefore, he sells in his own name, he acts beyond the scope of his authority, and his principal is not bound. But it is said, that by these means, the broker would be enabled by his principal to deceive innocent persons. The answer, however, is obvious, that that cannot be so, unless the principal delivers over to him the possession and *indicia* of property. The rule stated in the case of *Hern v. Nichols*, 1 Salkeld, 289. must be taken with some qualifications: as, for instance, if a factor, even with goods in his possession, acts beyond the scope of his authority, and pledges them, the principal is not bound; or if a broker, having goods delivered to him, is desired not to sell them, and sells them, but not in *market overt*, the principal may recover them back. The truth is, that in all cases, excepting where goods are sold in *market overt*, the rule of *caveat emptor* applies."

The general duty of a *factor* or agent is to procure the best intelligence of the state of trade at his place of residence; of the course of exchange; of the quantity and quality of goods at market, their present price, and the probability that it may rise or fall; to pay exact obedience to the orders of his employers; to consult their advantage in matters referred to his direction; to execute their business with all the despatch that circumstances will admit; to be early in his intelligence, distinct in his accounts, and punctual in his correspondence. (b) And being entrusted with the possession, as well as the disposal and management of the goods of his principal, he is bound to take due and proper care of them; such a degree of care as a prudent man would take of his own property. (c) Another important part of his duty is the protection of the property of his principal by an available insurance (d); and also to take care that in the importation and exportation of goods, proper entries are made at the custom-house, and that the duties are duly paid thereon. (e) So, in the sale of goods, a *factor* should not only observe the instructions of his principal, but when left to exercise his own judgment and discretion in the disposal of them, he should use his utmost skill and knowledge, and sell for the best prices, and for ready money, or *customary* credit (f): but when he sells on credit, he should be very careful to deal with persons of known responsibility. (g) A *factor* cannot legally make himself the purchaser; nor if employed to purchase, can he be the

(b) Vide Mal. Lex. Mer. 81. Beawes Lex. Mer. 45.

(c) *Coggs v. Barnard*, 2 Ld. Raym. 916, 917.

(d) *Smith v. Lascelles*, 2 Term Rep. Glaser v. Cowie, 1 Maule & Sel. 53.

(e) Cro. Jac. 265. Bac. Abr. tit. Merchant B. Molloy, 329. Mal. Lex. Mer. 83.

(f) Willes's Rep. 407. 3 Bos. & Pul. 489. Bulstr. 103.

(g) 12 Mod. 514. 1 Campb. Rep. 258.

seller, unless with the express consent of the principal, having full knowledge of all the attendant circumstances. (*h*)

Brokers are noticed in the stat. 1 Jac. 1. c. 21. s. 1. "as persons employed in the contriving, making, and concluding bargains between merchant *English*, and merchant strangers, and tradesmen, concerning their wares and merchandizes, to be bought and sold and contracted for, and monies to be taken up by exchange between such merchant and merchants, and tradesmen." And sec. 8. of the same statute speaks of brokers in *London* using and exercising the ancient trade of brokers between merchant and merchant. And by the stat. 6 Ann. c. 16. persons acting as brokers in *London*, must be admitted by the court of the Mayor and Aldermen, under such restrictions and limitations for their honest and good behaviour, as they shall think fit; and shall pay 40s. upon admission, and the same sum annually, under a penalty of 25*l.* for acting without. And in 1708, one year after the passing of the statute of Anne, the court of Mayor and Aldermen of the city of *London*, made certain rules and regulations for the government of brokers, which have since been and are still in force; and by virtue of which every person, previous to his being admitted a broker, is required to enter into a bond to the mayor, commonalty, and citizens of *London*, in a penalty of 500*l.*, and also to take an oath, the forms of which are prescribed by the same rules and regulations. The condition of the bond, amongst other things, provides, "That the broker shall upon every contract by him made, declare and make known to such person or persons with whom such agreement is made, the name or names of his principal or principals, either buyer or seller, if thereunto required; and that he shall not directly or indirectly, by himself or any other, deal for himself in buying any goods, wares, or merchandizes, to barter or sell again upon his own account, or for his own benefit or advantage, or make any gain or profit in buying or selling any goods, over and above the usual brokerage. (*i*) In a late case, where the condition of the bond was brought under the consideration of the Court of Common Pleas, (*k*) it was held, that if a broker be authorized by his principal to make a purchase for him in his (the broker's) own name, and the contract note be accordingly made out in the broker's name, without inserting that of his principal, such a purchase by the broker does not operate as a breach of the condition of his bond, especially where the broker enters the name of his principal as being the buyer, in the book kept by him for that purpose. Neither does the condition of the bond absolutely prohibit a broker from dealing as a trader on his own account, but it only operates as a prohibition *sub*

(*h*) Vide *Lowther v. Lowther*, 13 Ves. 103. *Coles v. Trecothick*, 9 Ves. 234. *Crave v. Ballard*, 5 Bro. Ch. Cas. 119. the oath at large in 1 Merivale's Rep. 156. and Holt's Ni. Pri. Cas. 431.

(*k*) *Kemble v. Atkins*, 7 Taunt. Rep. 260. 1 Mo. Rep. 6. S.C.

(*i*) See the Condition of the Bond and

modo, that is, it imposes upon him a penalty in the event of his trading. But if, in any transaction in which he is really engaged as a principal, he act ostensibly as a broker, such conduct is a gross fraud, in respect of which he can obtain no remedy in a court of justice.^(l) So, if a broker allow a third person, who has not been duly admitted as a broker, to have a *concurrent* and equal authority with himself, in his business of a broker, it is no breach of that part of the condition of the bond which prohibits his employing any person under him to act as a broker.^(m)

An agent is one employed to act for another either for a general or special purpose, and therefore, in its enlarged signification, comprehends a factor and broker, though the latter are confined to mercantile transactions: but an agent is not so limited, for he is frequently employed to transact the general business not only of merchants and traders, but of others; and the authority of an agent is created either by deed, by simple writing, by parol, or by mere employment, according to the nature of the business to be transacted: and his authority is either *general* or *special* with reference to its object, i. e. according as it is confined to a single act, or is extended to all acts connected with a particular employment. A general authority does not import an unqualified one, but that which is derived from a multitude of instances, whereas a particular authority is confined to an individual instance. And whether the authority is general or not, is to be collected from the general dealing between the principal and agent, and not merely from private instructions.⁽ⁿ⁾ If an agent is entrusted with a *general* power, he must exercise a sound and honest judgment in those matters which are left to his discretion; for he will not be justified in taking unreasonable or unusual measures, or doing any thing contrary to the interest of his principal. If, however, his proceedings are challenged, the principal must prove that he might have done better, and was guilty of wilful mismanagement. But when his power is *limited*, he must strictly adhere to his orders, which should always be given in writing. If he exceeds his power, though with a view to his employer's interest, he will be liable for the consequences. For example, if he gives credit, when none ought to be given, or longer credit than directed, for the sake of a better price; and the buyer afterwards becomes insolvent, he shall be answerable for the debt.^(o)

Although opinion will never justify a *factor* in acting contrary to orders, necessity sometimes will. As, if he be limited to sell goods at

(l) *Ex parte Dyster*, 1 Merivale's Rep. 155. 2 Rose Rep. 349. S. C.

(m) *Lord Mayor of London v. Brandon*, 2 Stark. Rep. 14. Holt's Ni. Pri. Cas. 438. S. C.

(n) Per Lord Ellenborough in *Whitehead v. Tuckett*, 15 East Rep. 408. And see *Pickering v. Busk*, 15 East, 38.

(o) Vide *Mal. Lex. Mer.* 81. and *Sadock v. Burton*, Yelv. 202.

a fixed price; and the goods be perishable, and not in a condition to be kept, and the factor has no time or opportunity for consulting with the principal, it is apprehended he may sell them for ready money under the price limited, in order to prevent a total loss. (p) But in such case it would be advisable to call in two sworn brokers, or other competent persons to examine the commodity.

A factor, broker, or agent cannot delegate his power to another without an express authority from his principal for that purpose. (q) And in the execution of the power given to a factor or agent, all contracts, and other acts should be expressed to be made and done by him in the name and on the account of his principal, otherwise the principal may not in all cases be bound by them, and in that event the factor or agent might be *personally* liable. (r) And a factor or agent who has power to sell the goods of his principal, cannot bind or affect the property of them by *tortiously* pledging, or otherwise disposing of them, either by way of security for, or in satisfaction of his own debt. (s) And where goods are thus pledged or disposed of, the principal may recover them back by action of trover against the pawnee, without tendering to the factor or agent what may be due to him, or without any tender to the pawnee of the sum for which the goods are pledged. And it is no excuse that the latter was wholly ignorant that the former held the goods as a mere factor or agent. (t) But a factor who has a lien on the goods of his principal may deliver them over to a third person as a security to the extent of his lien, with notice of his lien, and may appoint such third person as his servant to keep possession of the goods for him. And in that case the principal must tender the amount of the lien due to the factor before he can be entitled to recover back the goods so pledged. (u)

If goods are consigned to a factor or agent, who afterwards becomes bankrupt, and the goods remain in specie in his hands at the time of such bankruptcy, the principal may recover them from the assignees by action of *trover*: or, if the factor sells the goods, and his assignees afterwards receive the money, the principal may recover it from them in an action of *assumpsit* for money had and received. (v) So, where the factor sells goods and takes notes in payment from the vendee, payable at a future day, and his assignees afterwards receive the

(p) But see 2 Mod. 100.

(q) Bunb. 166.

(r) Vide 9 Co. 76. b. 1 Term. Rep. 181.
6 Term. Rep. 176, 7. Com. Dig. tit. Attorney, C. 14.

(s) Vide the cases of *Paterson v. Tush*, Stra. 1178. *Maans v. Henderson*, 1 East. Rep. 337. *Newson v. Thornton*, 6 East. Rep. 37. *M'Combie v. Davies*, Ib. 538. *Martini v. Cotes*, 1 Maule & Sel. 146.

(t) *M'Combie v. Davies*, 7 East. Rep. 5. See also *Hartop v. Hoare*, Stra. 1187. *Daubigny v. Duval*, 5 Term Rep. 604.

(u) Vide *M'Combie v. Davies*, 7 East. Rep. 7. Per Lord *Ellenborough* Ch. J. *Pickering v. Busk*, 15 East. Rep. 44.

(v) *Scott v. Surman*, Willes's Rep. 400. See also 6 East Rep. 26. in notis.

money, the principal may recover it from them in the same form of action. (w) So, bills remitted to a factor or banker, while unpaid, are in the nature of goods unsold; and if the factor become bankrupt they must be returned to the principal, subject to such lien as the factor or banker may have thereon. (x) But if goods be consigned to a factor for sale, and he sell, and receive the money for them before his bankruptcy, and do not purchase with the money any specific thing capable of being distinguished from the rest of his property, the principal cannot recover the whole amount from the assignees, but must come in under the commission. (y) So, it has been ruled in equity, that if one employs a factor, and intrusts him with the disposal of merchandize, and the factor receives the money, and dies indebted in debts of a higher nature, and it appears by evidence that this money was vested in other goods, and remains unpaid, those goods shall be taken as part of the merchant's estate, and not the factor's; but if the factor have the money, it shall be looked upon as the factor's estate, and must first answer the debts of a superior creditor, &c. for as money has no earmark, equity cannot follow that in behalf of him who employed the factor. (z) But if A. employs B. as his *factor* to sell cloth, and B. sells the cloth on credit, and before the money is paid, B. dies indebted by speciality more than his assets will pay; this money shall be paid to A. and not to the administrator of B. as part of his assets, but thereout must be deducted what was due to B. for commission; for a factor is in nature only of a trustee for his principal. (a)

Having made these introductory observations, I now propose to consider the general subject in the following order, viz.

1. OF THE AUTHORITY GIVEN TO FACTORS, BROKERS, OR AGENTS, TO SELL OR OTHERWISE DISPOSE OF THE GOODS, &c. OF THEIR PRINCIPALS; AND HOW FAR THE LATTER ARE BOUND BY THEIR CONTRACTS, MISREPRESENTATIONS, OR OTHER ACTS DONE WITHIN THE GENERAL SCOPE OF THEIR EMPLOYMENT: AND OF THE COUNTERMAND OR REVOCATION OF THEIR AUTHORITY, &c.
2. OF SALES ON *DEL CREDERE* COMMISSION.
3. OF SALES BY AUCTIONEERS.
4. OF PAYMENT TO OR SETTLEMENT WITH A FACTOR, BROKER,

(w) Willes's Rep. 400.

(x) *Zinck v. Walker*, 2 Bl. Rep. 1154.
See also Co. Bkpt. Laws, chap. 8. s. 15.

(y) *Scott v. Surman*, Willes's Rep. 400.

(z) *Whitcomb v. Jacob*, 1 Salk. 160.

(a) *Burdett v. Willett*, 2 Vern. 638.

OR AGENT, ON ACCOUNT OF GOODS SOLD FOR HIS PRINCIPAL, AND OF THE BUYER'S RIGHT TO SET OFF DEBTS DUE TO HIM FROM THE FACTOR, &c.

5. IN WHAT CASES THE PRINCIPAL, OR HIS FACTOR, BROKER, OR AGENT MAY SUE OR BE SUED.

6. OF THE RIGHTS AND REMEDIES BETWEEN PRINCIPAL, FACTOR, BROKER, AND AGENT, *INTER SE*.

1. OF THE AUTHORITY GIVEN TO FACTORS, BROKERS, OR AGENTS TO SELL OR OTHERWISE DISPOSE OF THE GOODS, &c. OF THEIR PRINCIPALS: AND HOW FAR THE LATTER ARE BOUND BY THEIR CONTRACTS, MISREPRESENTATIONS, OR OTHER ACTS DONE WITHIN THE GENERAL SCOPE OF THEIR EMPLOYMENT: AND OF THE COUNTERMAND OR REVOCATION OF THEIR AUTHORITY, &c.

1. OF THE AUTHORITY GIVEN TO FACTORS, BROKERS, OR AGENTS TO SELL, &c.]—A general power given by a principal to a factor, broker, or agent to buy or sell his goods, binds him to all contracts *bonâ fide* made in respect thereof. Indeed a *factor* is one who has a general power to buy and sell according to the best of his judgment, and therefore all bargains which third persons make with him without fraud or collusion, may be enforced against his principal; and if he sell for a less price, or upon different terms than his commission directs, his sale is nevertheless valid. (b)

But if a *broker* or agent be employed to make one particular purchase of goods of a certain description and price, the principal will not be bound by his contract, if the broker depart from his instructions in either of those particulars; but in the case of a factor or general broker, it would be otherwise. (c) It is necessary, however, with regard to a special agent, if it be intended to exclude from his authority any circumstance which would otherwise fall within it, that it should be done by express directions. For, though it has been decided, that a special agent employed to negotiate a bill of exchange, and expressly directed not to indorse it for his principals, could not bind them by

(b) Ambl. 498.

(c) *East India Company v. Henley*
1 Esp. Rep. 111.

doing so. (d) Yet when the fact appeared to be, that the agent was merely commissioned by the defendants to get the bill negotiated, and no express direction given him not to indorse it, it was resolved, that the defendants having commissioned the agent to get the bill discounted, without restraining his authority as to the mode of doing it, were bound by his acts: and, therefore, that he having warranted the bill to be a good one, this constituted a good consideration for their subsequent promise to pay it. (e) And this distinction has been taken upon the sale of a horse, namely, that where a person keeping livery stables, entrusts his servant with a horse to sell, and direct him *not* to warrant, and the servant do nevertheless warrant him, still the master will be liable on the warranty, because his servant is acting within the general scope of his authority, and the public cannot be supposed cognizant of any private conversation between the master and the servant: but if the owner of a horse send a *stranger* to a fair with *express directions not to warrant the horse*, and the latter act contrary to the orders, the purchaser can only have recourse to the person who actually sold the horse, and the owner is not liable on the warranty. (f)

In the absence of particular instructions, however, a general power to sell, implies a power to sell in the usual way; and therefore the right of an agent to sell upon credit, depends entirely upon the fact of that being the usual mode of dealing in the particular trade in question. If there be no such usage, no contract is created between the principal and vendee, and such sale is a conversion in the factor; and if not in *market overt*, no property is thereby altered, but trover will lie against the vendee. (h)

So, in the case of *Wiltshire v. Sims*, (i) where on the transfer of stock, which is usually sold for ready money, it was held, that a sale of stock for a bill at 14 days could not be enforced, the transaction being conducted by a stock broker to whom a general authority was given to sell. And upon that occasion Lord *Ellenborough* Ch. J. said, "When the defendant employed the broker to sell the stock, he employed him to sell it in the usual manner. He made him his agent for common purposes in a transaction of this sort. But did any one ever hear of stock being absolutely exchanged for a bill at fourteen days? Has a broker in common cases power to give credit for the price of stock which he agrees to sell? The broker here sold the stock in an unusual manner; and unless he was expressly authorised to do so, his principal is not bound by his acts."

So, if there be no usage to give credit, and a factor on a general au-

(d) *Fenn v. Harrison*, 3 Term Rep. 757.

(e) *Ibid.* 4 Term. Rep. 177.

(f) *Per Ashurst* Just. 4 Term. Rep. 177., and see 1 Dow. Rep. 44, 45.

(h) *Per Holt* Ch. J. 12 Mod. 514.

(i) 1 Campb. 258.

thority to sell, sell upon credit, the factor alone will be liable to the vendee; and unless such sale be in *market overt*, the property in the goods is not changed, nor even in *market overt*, if the vendee know that the vendor sells as factor. (*k*) And it is said, (*l*) that a court of equity will compel the vendee under these circumstances to render an account of what he holds.

A broker who does not disclose his principal may vary the terms of payment after the sale is completed; but when the principal is disclosed, the broker is no longer authorised to alter the terms of the contract. (*m*)

It is, however, necessary to the general interest of the mercantile world, that the principal should in some cases be bound by the sale of a special agent, though he does so contrary to his directions; as for instance, where goods are sent in such a way and to such a place as to exhibit an apparent purpose of sale. And accordingly in the case of *Pickering v. Busk*, (*n*) which was an action of trover for hemp: and at the trial before Lord *Ellenborough* Ch. J., it appeared, that *Swallow*, a broker in *London*, engaged in the hemp trade, had purchased for the plaintiff, a merchant at *Hull*, a parcel of hemp then lying at *Symond's Wharf* in *Southwark*. The hemp was delivered to *Swallow*, at the desire of the plaintiff, by a transfer in the books of the wharfinger from the name of the seller to that of *Swallow*. Shortly afterwards, *Swallow* purchased for the plaintiff another parcel of hemp, lying at *Brown's quay, Wapping*; which latter parcel was transferred into the names of *Pickering*, (the plaintiff,) or *Swallow*. Both these parcels of hemp were duly paid for by the plaintiff. *Swallow*, however, whilst the hemp remained thus in his name, having contracted with *Hayward* and Co., as the broker of *Blackburn* and Co. for the sale of hemp, and having none of his own to deliver, transferred into the names of *Hayward* and Co., the above parcels in satisfaction of that contract, for which they paid him the value. *Hayward* and Co. shortly after became bankrupts; and the plaintiff discovering these circumstances, demanded the hemp of the defendants, their assignees, and upon their refusal to deliver it, the present action was brought. His lordship was of opinion upon this evidence, that the transfer of the hemp, by direction of the plaintiff, into *Swallow's* name, authorised him to deal with it as owner, with respect to third persons; and that the plaintiff, who had thus enabled him to assume the appearance of ownership to the world, must abide the consequence of his own act. A verdict was therefore found for the defendants: and upon a rule *nisi* to set aside the verdict, the Court determined that the verdict was right. And Lord *Ellenborough* Ch. J. said, "It

(*k*) 12 Mod. 515. Ante 556.

(*l*) 3 Ves. 226.

(*m*) *Blackburn v. Scholes*, 2 Campb. Rep. 343.

(*n*) 15 East Rep. 38.

cannot fairly be questioned in this case but that *Swallow* had an implied authority to sell. Strangers can only look to the acts of the parties, and to the external *indicia* of property, and not to the private communications which may pass between a principal and his broker: and if a person authorize another to assume the apparent right of disposing of property in the ordinary course of trade, it must be presumed that the apparent authority is the real authority. I cannot subscribe to the doctrine, that a broker's engagements are necessarily and in all cases limited to his actual authority, the reality of which is afterwards to be tried by the fact. It is clear, that he may bind his principal within the limits of the authority with which he has been apparently clothed by the principal in respect of the subject-matter; and there would be no safety in mercantile transactions if he could not. If the principal send his commodity to a place, where it is the ordinary business of the person to whom it is confided to sell, it must be intended that the commodity was sent thither for the purpose of sale. If the owner of a horse send it to a repository of sale, can it be implied that he sent it thither for any other purpose than that of sale? Or if one send goods to an auction-room, can it be supposed that he sent them thither merely for safe custody? Where the commodity is sent in such a way, and to such a place as to exhibit an apparent purpose of sale, the principal will be bound and the purchaser safe. The case of a factor not being able to pledge the goods of his principal confided to him for sale, though clothed with an apparent ownership, has been pressed upon us in the argument, and considerably distressed our decision. The Court, however, will decide that question when it arises, consistently with the principle on which the present decision is founded. It was a hard doctrine when the pawnee was told that the pledger of the goods had no authority to pledge them, being a mere factor for sale; and yet since the case of *Paterson v. Tash*, (o) that doctrine has never been overturned.

So, where a factor has an absolute power to sell goods consigned to him from abroad, an indorsement of a bill of lading by him while the ship is at sea, provided it be by way of sale, and not of pledge, passes the property, and divests the principal's right to stop *in transitu*. (p)

But the authority of a factor to *sell* the goods of his principal, does not authorize him to barter them for other goods; and if he, in point of fact, barter the goods, and deliver them, and receive other goods in exchange, no property passes by the delivery, and the owner of the goods may maintain an action of trover for them against the person to whom they are bartered and delivered, though he did not know that he had

(o) 2 Stra. 1178. et vide *Daubigny v. Duval*, 5 Term Rep. 604.

(p) 4 Burr. Rep. 2051. 6 East 41. Peake's Cas. N.P. 190. & 9 East Rep. 516.

been dealing with a person who was merely a factor. But it seems that if it had been a sale in *market overt* it would have bound the seller. (q)

So, an agent cannot delegate his authority to another, so as to bind the principal by the acts of the sub-agent; but if an express authority be given to employ a sub-agent, or where the usual course of management of the principal's concerns, in the employment of a sub-agent, is pursued for a length of time, and recognised by the owners of property, they will be taken to have adopted the acts of the sub-agent as the acts of the agent himself, and will be liable. (r)

2. A PRINCIPAL IS LIABLE FOR THE DECEIT OF HIS FACTOR IN THE SALE OF GOODS, AND ALSO FOR THE MISAPPLICATION OF MONEY BY HIS AGENT.] — Thus, in the case of *Hern v. Nichols*, (s) which was an action on the case for a deceit, the plaintiff set forth, that he bought several parcels of silk for ——— silk, whereas it was another kind of silk; and that the defendant, well knowing this deceit, sold it to him for ——— silk. On the trial, it appeared that there was no actual deceit in the defendant, who was the merchant, but that it was in his factor beyond sea: and the doubt was, if this deceit could charge the merchant. *Holt* Ch. J. was opinion, that the merchant was answerable for the deceit of his factor, though not *criminaliter* yet *civiliter*; for seeing somebody must be a loser by this deceit, it is more reasonable that he who employs and puts a trust and confidence in the deceiver should be a loser than a stranger: and upon this opinion the plaintiff had a verdict.

So, where money is paid to an agent or servant, and he misapplies it, the principal or agent is liable. (t)

3. OF THE COUNTERMAND OR REVOCATION OF THE AUTHORITY OF A FACTOR, BROKER, OR AGENT.] — The authority of a broker or agent may, in general, be countermanded by the principal at any time before the contract has been completed, if the party contracted with has not been already put in a worse situation; though where the agent's power is coupled with an interest, it cannot be determined without his consent, unless by the principal's death or bankruptcy. (u) The authority of a broker may be countermanded at any time before the memorandum of the contract of the sale is written and signed by him, pursuant to the statute of frauds, although he had previously entered into a verbal agreement to sell the goods. (v) But where a broker is authorised by one man to sell goods, and by another to buy the same, an entry in his books of a sale of these goods, from the one to the other, signed by him, is a binding contract between the parties; the bought-and-sold note

(q) *Guerreiro v. Peile*, 3 Barn. & Ald. 616.

(r) 2 Campb. Rep. 218. 597. And see Bunb. Rep. 166.

(s) 1 Salk. 289. *Holt*. 462. S.C. See also 1 Term Rep. 12.

(t) *Cary v. Webster*, 1 Stra. 480.

(u) *Watson v. King*, 4 Campb. Rep.

272. 5 Esp. Rep. 158. 2 Stark. Rep. 51.

(v) *Farmer v. Robinson*, 2 Campb.

which is a copy of this entry, is sent to the parties, not for their approval, but to inform them of the terms of the contract. (v) The agent's power is *ipso facto* determined by the bankruptcy or death of the principal. (w) And in general the authority of an agent, for the purpose of sale, is at an end by the sale; and therefore an auctioneer after the sale, has no authority to treat of the terms upon which a title is to be made. (x)

2. OF SALES, &c. ON A *DEL CREDERE* COMMISSION.

Del credere is said to be an *Italian* mercantile phrase, and signifies a particular kind of credit or responsibility, and when applied to the situation of a factor, it is understood in the following sense: a factor who has *general* orders to dispose of goods for his principal, and, in consideration of being paid an additional commission, (y) acts in nature of an insurer to him, by guaranteeing the solvency of the vendee, and thereby undertaking to pay the money if the vendee does not; on failure therefore of the vendee, the factor is to stand in his place, and to make his default good: and in an action upon such a guarantee, the declaration must set forth the matter specially. (z) The guarantee must also be in writing to satisfy the statute of frauds (a).

In the case of *Mackenzie* and another v. *Scott*, (b) where a factor, under a commission *del credere*, sold goods and took accepted bills from the purchasers, which he indorsed to a banker at the place of sale, and received the banker's bill, (payable to the factor's order) on a house in *London*. This last bill the factor indorsed and transmitted to his principal, who got the same accepted; but the acceptor and drawer afterwards failed. It was held, that the factor was answerable for the amount of the bill; being personally liable, under his commission *del credere*, to satisfy his principal the price of the goods sold.

3. OF SALES BY AUCTIONEERS.

An auctioneer is considered as an agent both for the buyer and the seller. (c) And an auctioneer, employed to sell the goods of a third person by auction, has such a special property in them that he may maintain an action in his own name for *goods sold and delivered*, against a buyer, even though the sale be at the house of such third person, and the goods known to be that person's property. (d) He is also in the

(v) *Hayman v. Neale*, 2 Campb. 337.

(w) 4 Campb. Rep. 272.

(x) *Scaton v. Slade*, 7 Ves. 276.

(y) Vide 6 Bro. P. C. 287. oct. ed. The *del credere* commission is usually $1\frac{1}{2}$ or 2 per cent. in addition to the customary commission for selling, &c.

(z) See 4 Maule & Sel. 574. and 1 Mo. Rep. 279.

(a) Ante, 190.

(b) 6 Bro. P. C. 280. oct. ed.

(c) Ante 99.

(d) *Williams v. Millington*, 1 H. Bl. 81.

nature of a stakeholder and liable to be sued for the recovery of the deposit money, where a valid title cannot be made to the purchaser. (e) So, where an auctioneer does not disclose the name of his principal at the time of the sale, and the contract is not completed, he is personally liable to an action for damages and expences.

If an auctioneer, whilst selling household fixtures, has notice that they do not belong to his principal, but he, notwithstanding proceeds to sell them, he is *personally* liable to the real owner, in an action of *assumpsit* for the proceeds of the sale, or to an action of *trover*. (f)

An action does not lie against an auctioneer, at the suit of his employer, for selling goods at the highest price bid for them, under the usual conditions of sale, though he might have had the owner's express directions not to let them go under a larger sum named. He would, however, be liable, if the owner had directed him to *set* the goods *up* at a particular price, and not lower. (g)

An auctioneer, having sold an estate, received a deposit of the purchaser; but the title being discovered to be defective, an action was brought against him to recover back the amount of the deposit, which he accordingly paid, together with the costs of the action: it was ruled, (h) that the auctioneer could not recover the amount of the costs against his principal in an action of *indebitatus assumpsit*, for money paid, but should have declared specially.

So, where an auctioneer was employed to sell an estate, the lowest price of which was fixed by the owner, and written down by him on a piece of paper, which was put under a candlestick at the time of sale, with the privity of the auctioneer, but not signed by the owner, nor any notice in writing given to the auctioneer of the price so set down, nor had the auctioneer given the previous notice of the sale to the collector of the duty, as required by the acts of the 19 Geo. III. c. 56. and 28 Geo. III. c. 37.: but being asked at the sale whether he had taken the proper precautions to avoid the duty in case there were no sale, he said, that it was his mode to fix a price under the candlestick, and if the bidding did not come up to that price, it was no sale or duty: in point of fact there was no sale. The duty, however, did attach, in consequence of the auctioneer not having taken the precautions required of the owner, by the statutes under such circumstances; and the auctioneer was sued for the duty on his bond to the crown, and compelled to pay it: the Court of King's Bench decided that the auctioneer could not recover it over against the owners, he having warranted that proper precautions had been taken to

(e) *Burrough v. Skinner*, 5 Burr. 2639.

(g) *Berwell v. Christie*, Cowp. 395.

(f) *Hardacre v. Stewart*, 5 Esp. Rep.

(h) *Spurrier v. Elderton*, 5 Esp. Rep. 1.

prevent the duty attaching in the event, though both parties were mistaken in the law. (g)

So, if the sale of an estate by auction become nugatory by the negligence of the auctioneer who is employed to sell it, he will not be entitled to any recompence for his services from the vendor. (h)

So, if he sell goods and deliver them without notice of any lien or claim which he has on the owner, and the buyer, without such notice, settle for the goods with the owner, the auctioneer cannot sue the buyer for the price of the goods. And if the auctioneer sell the goods of B. as the goods of A., and the buyer pay the price to A., the auctioneer cannot recover the price from the buyer. (i) If no payment be made by the buyer in such case, and the auctioneer bring an action against him for the price of the goods, the buyer may set off a debt due from A. to him. (k) The clerks of auctioneers are not authorised to act in the absence of their masters, as agents for the employers of the auctioneers, unless the employers empower them so to do. (l)

4. OF PAYMENT TO, OR SETTLEMENT WITH A FACTOR, BROKER, OR AGENT, ON ACCOUNT OF GOODS SOLD FOR HIS PRINCIPAL: AND OF THE BUYER'S RIGHT TO SET OFF DEBTS DUE TO HIM FROM THE FACTOR, &C.

1. OF PAYMENT TO, OR SETTLEMENT WITH A FACTOR, BROKER, OR AGENT.]—Where a factor sells the goods of his principal in his own name, and makes the buyer debtor to himself, he has a right to receive the price, and he may support an action for it against the buyer; and it will be no defence to such action for the buyer to say, that the principal is indebted to him in more money, except in cases where nothing is due from the principal to the factor: and where a factor who had become surety for his principal, for money borrowed by him, upon an engagement by the principal to send the factor all the goods he should make of the money borrowed, sold goods in his own name, but the goods were marked with the name of the principal, and the purchaser knew that the seller sold the goods as factor; and after an act of bankruptcy committed by the principal, and notice by his assignees to the purchaser not to pay the price of the goods to the factor, the purchaser did nevertheless pay it to the factor: the Court of King's Bench held him warranted in so doing. (m)

(g) *Copp v. Topham*, 6 East. Rep. 392. For more concerning auctioneer, and

(h) *Denew v. Daverell*, 3 Campb. Rep. 451. sales by auction, vide ante, 132.

(i) *Coppin v. Walker*, 7 Taunt. 237. 251. See also, *Coppin v. Walker*, 7 Taunt. Rep. 237. 3 Mar. Rep. 497.

(k) *Coppin v. Craig*, *Ibid.* 243.

(l) *Colcs v. Trecothick*, 9 Ves. 243. 251.

(m) *Drinkwater v. Goodwin, Cowp.*

But though in ordinary cases, the factor sell goods without disclosing his principal, yet, if the principal give notice to the buyer to pay to him, and not to the factor, the buyer will not be justified in afterwards paying the factor, if nothing be then due to him from his principal. (n) But where the owner of goods, being indebted to a factor in an amount exceeding their value, consigned them to him for sale; the factor being also similarly indebted to I. S., sold the goods to him; the factor afterwards became bankrupt; and on a settlement of accounts between I. S. and the assignees, I. S. allowed credit to them for the price of the goods, and he then proved the residue of his claim against the estate: it was determined, that as the factor had a lien on the whole price of the goods, such settlement of accounts between the vendee and the assignees afforded a good answer to an action against the vendee for the price of the goods, brought either by or on the account of the original owner. (o)

So, if the owner of goods allow his broker to sell them as a principal, the purchaser will be discharged by paying the price of the goods to the broker. (p) And if on some occasions the principals allow their brokers to draw bills in their own name for goods which they have sold on their account, they are bound by a payment made to the brokers by a purchaser. (q) And upon a sale of goods by a broker, for a principal not named, upon the terms of—"payment in one month, money;" which terms are specified in the bought and sold notes handed over to the respective parties by the broker; a payment made to the broker within the month, by a bill of exchange, accepted by the buyer, and discounted by him within the month, is good; but the buyer being also indebted to the same broker for another parcel of goods belonging to other persons, and accepting the bill for a larger sum than either of the parcels of goods alone amounted to, though not for a sum large enough to cover both demands, and there being no specific appropriation of the payment to either of the debts, it was held, that on the broker stopping payment, the payment for the goods ought to be equitably apportioned between the several owners of the goods sold, and that they were respectively entitled to recover the difference from the buyer. (r) And in this case the jury were of opinion that the stipulation in the contract, of a "month money," meant, in the understanding of commercial men, payment at any time within a month; and that the payment in question within the month to the brokers, with whom the defendant had dealt without the knowledge of their principal, was a good payment to bind their principal.

(n) Bull Ni. Pri. 130.

(q) *Townsend v. Inglis*, Holt. N. P.(o) *Hudson v. Granger*, 5 Barn. & Ald.

Cas. 278.

27.

(r) *Favenc v. Bennett* 11 East. 56.(p) *Coates v. Lewis*, 1 Campb. 444.

So, with regard to general agents, the rule of law is, "that if a creditor employs an agent to receive money of a debtor, and the agent receives it, the debtor is discharged as against the principal; but if the agent, instead of receiving money, writes off money due from him to the debtor, then the latter is not discharged. In cases of insurance, usage may possibly introduce a different rule; but at all events an underwriter has never been considered discharged as against the assured, until his name has been struck off the policy. If the underwriter relies on his communication with the broker, as discharging him, without actual payment of the money, he should insist that his name should be struck off the policy. If that be done, and the plaintiff then forbears to call upon him for payment within the period warranted by the usage of the trade, then the underwriter may be discharged, but otherwise he is not. (s)

So, a tender of money to an agent, authorised to receive payment, is as good as a tender to the creditor in person. (t) But the demand of a debt, to do away the effect of a tender, must be made by some one authorized to give the debtor a discharge. (u)

If a creditor take the security of the agent of his debtor in payment of the debt, unknown to the principal, and give the agent a receipt as for the money due from the principal, in consequence of which the principal deals in any manner differently with the agent, on the faith of the receipt, the principal is discharged, though the security fail: but the principal is not exonerated from the payment, if he cannot show that he was injured by means of such false voucher, and the omission of the party to inform him of the truth in time. (v)

It should here be observed, that with regard to sales made through the intervention of a known *broker*, the general rule, as to payment, is, that upon a sale of goods to a *broker*, the vendor is not confined to the credit of the latter, but may resort to the principal at the day of payment; and the vendor will not be affected by the state of the accounts between them; nor will it be any available defence to say, that the principal had previously paid the price of the goods to his broker: but if the vendor suffer the day of payment to go by, without a demand on the vendee, he may thereby lead the principal into a supposition that he relies solely on the broker; and if in that case the price of the goods have been paid to the broker, the principal will be discharged. (w) And where a factor made purchases for his principal, who made payments to him on account, and afterwards the factor was pressed for payment by a letter which came to the hands of the principal, who transmitted it to the factor, and with a knowledge of the fact paid him the residue, it was

(s) *Per Abbott Ch. J.* 4 Barn. & Ald. 398.

(t) *Goodland v. Blewith*, 1 Campb. 477.

(u) *Coles v. Bell*, *ibid.* 478.

(v) *Wyatt v. The Marquis of Hertford*, 3 East, 147.

(w) *Kymer v. Sowercrop*, 1 Campb. 109.

held by Lord *Mansfield*, that the principal was liable over to the sellers for the money he had so paid to his factor after notice. (x) And where the defendant bought goods of the plaintiff in the name and upon the credit of *Smith* and Co., but the purchase was in reality made for himself, he was held liable. (y) But if the seller of goods, knowing at the time that the buyer, though dealing with him in his own name, is in truth the agent of another, elect to give credit to such agent, he cannot afterwards recover the value against the known principal. (z) But a payment to a broker varying from the original terms of the contract, is not valid; nor will evidence of a usage to authorise such a variation be admissible. (a)

2. OF THE RIGHT OF SET OFF BY THE BUYER, OF A DEBT DUE TO HIM FROM THE FACTOR, BROKER, OR AGENT.]—Having in the preceding section shown in what cases a purchaser is discharged by payment to a factor, broker, or agent, it is now proposed to consider in what cases he is allowed to set off a debt due to him from the factor. The general rule of law, in regard to dealings with a *factor*, is, that where he does not disclose his principal, as is seldom the case, but sells and delivers the goods in his own name, and as his own property, the person with whom he deals may set off a debt due to him from the factor, in an action brought against him by the principal for the price of the goods. (b) But if upon a sale of goods by a *broker*, the name of the principal be disclosed, no right of set off can exist. This was settled in the case of *Morris v. Cleasby*, (c) where the defendant purchased, as broker for B., the goods of A., for whom he sold them under a *del credere* commission, and did not disclose at the time the name of A., but disclosed it soon after, and afterwards paid A. the price, it was determined by the Court of King's Bench, that, in an action by the assignees of B. to recover the balance due upon a re-sale of the goods made by the defendant on account of B., the defendant was not entitled, either under stat. 2 G. 2. c. 22. s. 13. or 5 Geo. 2. c. 30. s. 28. to set off the payment made to A.: and the general rule laid down in this case is, "that the principal must always be debtor, and that whether he is known in the first instance or not: and it will make no difference whether the vendee does or does not know, at the time of the sale, that the broker sells for an unknown principal, or that he has a *del credere* commission."

It has also been determined, with regard to factors, that circumstances which show collusion between the factor and buyer, as the insolvency of the factor known to the buyer, would defeat the right he

(x) *Powell v. Nelson*, 15 East Rep. 65.

(y) *Railton v. Hodgson*, *ibid.* 67.

(z) *Paterson v. Gandasequi*, 15 East Rep. 62. *Addison v. same*, 4 Taunt. Rep. 574.

(a) *Campbell v. Hassel*, 1 Stark. Rep.

235.

(b) *George v. Clagett*, 7 Term Rep. 359. & 2 Esp. Rep. 557.

(c) 4 Maule & Sel. 566.

would otherwise have. (d) The mere knowledge, however, of the seller being a factor, is not sufficient to deprive the buyer of the privilege of set off without express knowledge that he acts as agent in that particular instance; because a man who is in the habit of selling for others, may likewise sell goods of his own. (e) No right of set off can be allowed between a salesman and a buyer of cattle at *Smithfield* market, to an action brought by the owner of cattle sold, though evidence was offered to prove, that, by the universal custom of the market, the defendant was considered as the debtor of the salesman, and not of the owner, with whom he had no connection. But Lord *Kenyon* Ch. J. refused the evidence, declaring no custom could deprive the plaintiff of that which by the law of the land he was entitled to receive; and laid particular stress upon the defendant's knowledge that he received the money for the use of another; which he said distinguished the case from that of a banker receiving money from a factor whose principal he had never heard of. (f) And it is also clear, that a principal can never be allowed to set off a debt due to him from his own broker, against the demand of one with whom he has contracted through the medium of the broker. (g)

But it may be observed generally, that where the principal resides abroad, he is presumed to be ignorant of the party with whom his factor deals, and therefore the whole credit is considered as subsisting between the contracting parties. (h)

5. IN WHAT CASES THE PRINCIPAL, OR HIS FACTOR, BROKER, OR AGENT, MAY SUE OR BE SUED.

1. IN WHAT CASE THE PRINCIPAL MAY SUE OR BE SUED.] — It is a general rule, that if a factor, broker, or agent, sell goods for his principal, the action may be brought either in his own name or in that of his principal. But when brought in the name of the principal, he has the benefit of the factor's evidence. (i) And though the agent act upon a *del credere* commission, which makes him liable on failure of the vendee, yet the responsibility of the vendee to the principal is not altered by that circumstance. (k) So, where credit has been properly given to an agent on a purchase for the use of the principal, the vendor has, in general, a right to come upon the latter for payment, without regard to any transaction or account between the principal and the agent. Therefore no private agreement, by which it is stipulated between the principal and agent, that the latter only is to be answerable to the seller,

(d) *Escot v. Milward*, 7 Term Rep. 361. n. b.

(e) *Moore v. Clementson*, 2 Campb. Rep. 24.

(f) *Peake's Ni. Pri. Cas.* 177.

(g) *Waring v. Favenc*, 1 Campb. Rep. 85.

(h) 3 Bos. & Pul. 489. *Paterson v. Gandasequi*, 15 East Rep. 64.

(i) 1 Atk. 248.

(k) 4 Maule & Sel. 574.

can affect the right of the latter. (l) Thus, in the case of *Kymer v. Suercropp*, (m) which was an action for goods sold and delivered; and the facts were, that the plaintiffs sold the goods to K. and Co. to be taken away in one month, and paid for in a month from the sale. K. and Co. were really brokers for the defendant, but that was not known to the plaintiffs till some time after the sale. K. and Co. became insolvent before the expiration of the month, the defendants having previously paid them the price of the goods. It was contended for the defendant, that though in general, upon a sale to a broker, the vendor may come upon the principal when discovered, the doctrine must be taken with this qualification, that the principal has not previously paid the price of the goods to the broker. But Lord *Ellenborough* Ch. J. said, "A person selling goods is not confined to the credit of a broker who buys them, but may resort to the principal on whose account they are bought; and he is not affected by the state of accounts between the two. If he let the day of payment go by, he may lead the principal into a supposition that he relies solely on the broker; and if in that case the price of the goods have been paid to the broker, on account of this deception, the principal shall be discharged. But here payment was demanded on the day it became due, and no reason was given the defendant to believe that his broker alone was trusted: and accordingly a verdict was directed for the plaintiff." And for the same reasons a principal cannot, under these circumstances, protect himself by setting up a balance due to him from his own broker. (n)

And it may be taken as a general rule, that the principal is liable, when discovered, whether his name be disclosed or not at the time of the contract, unless in particular cases, where, by the usage of trade, the credit is understood to be confined to the agent. (o) But where A., a foreign merchant employed B. to purchase goods on commission; the vendors (with the knowledge that the purchases were made on account of A.) made out the invoices to B., and took in payment his acceptances: it was held, that there was no contract of sale as between A. and B. (p)

2. IN WHAT CASES THE FACTOR, BROKER, OR AGENT MAY SUE OR BE SUED.] — Where a contract is made by a factor, an action may be brought upon it in his own name. And it is the same thing whether the contract be made by the factor solely upon his own credit, as is generally the case with factors abroad, or as the known representative of another: and it is indifferent whether he act under a *del credere* commission or not. (q) But when the principal has once come forward and

(l) Paley on Principal & Agent, 186. 15 East Rep. 62. and *Addison v. Same*,
 (m) 1 Campb. Rep. 109. *Speering v.* 4 Taunt. Rep. 574.
Degrave, 2 Vern. 643. (p) *Seymour v. Pychlau*, 1 Barn. &
 (n) *Waring v. Favenc*, Ante, 549. Ald. 14.
 (o) Vide *Paterson v. Gandasequi*, (q) 1 Atk. 248. Bul. Ni. Pri. 130. 3 Bos. & Pul. 491, 495.

demand payment, and taken steps for the recovery of the debt, the factor is no longer a creditor. (r)

It has also been determined, that where a factor, having money due to him from his principal, who receives cloths, and is authorised to sell them in his own name, but makes the buyer debtor to himself, though he is not answerable for the debts, yet he has a right to receive the money, and his receipt is a discharge to the buyer: he has also a right to bring an action against him to compel the payment; and it would be no defence for the buyer in that action to say, that, as between him and the principal, he (the buyer) ought to have that money, because the principal is indebted to him in more than that sum; for the principal himself can never say that, but where the factor has nothing due to him." And in the same case, it was observed by Lord *Mansfield*, "That there is no case in law or equity, where a factor having money due to him to the amount of the debt in dispute, was ever prevented from taking money for cloths in his hands." (s)

So, a broker, who has advanced money on goods, may declare on a contract respecting the sale of them in his own name, though in the sale-note the name of the principal is inserted. (t) So, in the case of *Banfill v. Leigh* and another, (u) where A. and B. assigned to the plaintiff all debts due to them, and gave him a power of attorney to receive and compound for the same, under which the plaintiff submitted to arbitration the matters in difference subsisting between his principals and the defendants; and the plaintiff and defendants mutually promised to perform the award. The arbitrator awarded a sum of money to be paid by the defendants to the plaintiff as such attorney, and the action was brought in his name for the recovery of that sum. The Court held, that the action was well brought in the name of the plaintiff.

With regard to actions against agents, the general rule is, that if a man is known to act merely as an agent, and the principal is known, and there is no express engagement by the agent, nor any circumstances from which it may be inferred, that the credit is given to him, the agent, though the person immediately making the contract, is not subject to personal responsibility. Indeed, it has been decided, that if a servant do not bind himself by express words, and the thing come to the use of the master, he is not liable to be sued. (v) And it has been said, that no rule of law is better ascertained, or stands upon a stronger foundation than this, that where an agent names his principal, the principal is responsible and not the agent. (w) And therefore agents, when acting for their principals, under a proper authority, are not in general

(r) *Sadler v. Leigh*, 4 Campb. Rep. 195.

(u) 8 Term Rep. 571.

(s) Per Curiam in *Drinkwater v. Goodwin*. Cowp. 355. See also Loft. 331. S.P.

(v) Dy. 230. a.

(t) *Atkins v. Amber*, 2 Esp. Rep. 493. See also 1 Campb. 337.

(w) Per Lord *Erskine*, ex parte *Har-lop*, 12 Ves. 352.

liable in their individual capacities. (x) Thus, in the case of *Owen v. Gooch*, (y) which was an action for work done; and the order was proved to have been given by *Gooch*, (the defendant.) The defence was, that the work was ordered for another person, named *Tippel*; that the work in question was done at *Tippel's* house, and that the plaintiff at the time of the order, was informed that the work was on *Tippel's* account. The entry also in the plaintiff's books was, "*Tippel*, by the order of *Gooch*." Lord *Kenyon* Ch. J. ruled, "That the mere act of ordering the goods for another does not make the person giving the order liable. If a man order goods, though they be in fact for another, yet if the tradesman were not informed at the time they were so, he who ordered them is certainly liable; for the tradesman must be presumed to have looked to his credit only. So, if they were ordered for another person, and the tradesman refuse to deliver them to that person's credit, but to his only who ordered them, there is then no pretext for charging such third person; or if the goods were ordered to be delivered on account of another, and after the delivery, the person who gave the order refuses to inform the tradesman who the principal is, that he may sue him; under such circumstances he is himself liable. But wherever an order is given by one person for another, and he informs the tradesman who that person is for whose use the goods are ordered, he thereby declares himself to be merely an agent; and there is no foundation for holding him to be liable. In this case the plaintiff was informed of all the circumstances; *Gooch* gave the order for *Tippel*; the goods were sent to *Tippel's* house and the entry made in his name. There is no colour for making *Gooch* the debtor."

So, where money is paid by mistake to an agent for the use of his principal, and the agent has paid it over, he is not liable in an action by the person who mispaid it; because it is just that one man should not be a loser by the mistake of another; and the person who made the mistake is not without redress, but has his remedy over against the principal. On the other hand it is just, that as the agent ought not to lose, he should not be a gainer by the mistake: and therefore, if, after the payment so made to him, and before he has paid the money over to his principal, the person corrects the mistake, and gives him notice not to pay it over to his principal; the agent cannot afterwards pay it to his principal, without making himself liable to the real owner for the amount. (a) But the mere circumstance of passing such money in *account*, or *making rest*, without any new credit given, fresh bills accepted, or further sum advanced for the principal, in consequence of it, is not equivalent to the payment of it over to the principal. (b)

(x) Per Lord Ch. *Talbot*, 3 P. Wms. 279. 568. See also *Sadler v. Evans*. 4 Burr. 1984. Bul. N. P. 133. S.P.

(y) 2 Esp. Rep. 567.

(a) Per Lord *Mansfield*. Cowp. 566.

(b) *Buller v. Harrison*, Cowp. 565.

But if a factor, employed by a principal resident abroad, buy or sell goods for him here, an action will lie against or for him in his own name; for the credit will be presumed to be given to him in the first case, and in the last, the promise to be made to him. (c)

So, where a factor or servant buy goods generally, and do not upon the contract declare that he buys only as factor or servant, he is chargeable in his own right; and in all cases where a factor delivers goods as his own, and conceals his principal, he is to be taken to all intents as the principal. (d) This notification of the principal must be at the time of the contract; it is not sufficient to make it afterwards. Thus, in an action for the non-delivery of goods, it appeared that the defendant had entered into and signed a written contract, engaging to deliver certain goods to the plaintiff, which he had failed to do. The defence was, that the defendant was merely a factor, and that this was known to the plaintiff before the action brought, but subsequent to the contract. Lord *Ellenborough* Ch. J. was of opinion that the defendant was liable, the principal not having been notified at the time, and no subsequent act being done to shew that the plaintiff waived the liability of the defendant, and relied upon the principal. (e) And though it be known that the agent acts in a representative character, yet if the principal be not known, he is bound personally. Thus, an auctioneer, who did not disclose his principal at the time of the sale, has been held personally liable, upon the non-execution of the contract of sale. (f)

So, agents are liable to be sued upon contracts made on behalf of their principals, where they individually bind themselves by their own undertaking: thus, where an agent by writing acknowledged to have received goods for his employer, and by the same writing bound himself to pay at a day certain; it was held by all the judges, that an action of *assumpsit* would lie against him. (g) So, a bill of exchange drawn upon an agent and accepted by him generally, binds him, at least against a third person: as in the case of the *Cashier of the York Buildings Company*, to whom a bill was addressed by the name of *J. B. Cashier of the York Buildings Company*, and by him accepted generally thus, "Accepted, *J. B.*" The agent was held liable to the payee. (h) But it was said, that, perhaps, he would not be so to the drawer who knew that the bill was drawn and accepted on account of the company. (i) So, where a merchant drew upon his factor in these terms, "Pay to Messrs. *M—* and Co., or order 195*l.* out of the produce of my goods, now lying at

(c) *Gonzales v. Sladen*, Bull. Ni. Pri. 130.

(d) Per Lord *Manfield*, 7 Term. Rep. 350.

(e) *Morgan v. Corder*, sittings after Easter Term. 1809. Guildhall, Paley on Principal and Agent 293.

(f) *Hanson v. Roberdeau*, Peake's Ni. Pri. Cas. 120.

(g) Dy. 230. a.

(h) *Stra.* 955.

(i) *Ibid.*

Gibraltar, &c., as soon as the same shall come to your hands, after paying the present acceptances;" to which the factor underwrote, "I agree to conform to this order," it was decided, that he was liable to the holder, having received assets, though the balance of accounts between him and his principal was in his favour. (k) So, where an agent covenanted for himself, his heirs, &c. under his own hand and seal for the act of another, was adjudged to be personally liable, though he describe himself in the deed as covenanting for and on the part and behalf of such other person. (l) So, a bond reciting that differences subsisted between *I. F.* and the plaintiff; and was conditioned to be void if *G. H.* the defendant, for and on behalf of *I. F.*, should perform the award of arbitrators. The award was made, directing that the defendant should pay a certain sum, and that the plaintiff and defendant should execute general releases: it was determined, that the submission bound the defendant, and that the award was good. (m)

But upon the sale of goods, a warranty by a known broker, agent, or servant, made pursuant to his authority, will not subject him to answer personally, unless his own responsibility appear by the terms of the warranty to be pledged, or to form the consideration of the sale. (n) But if a special agent employed to sell, with orders not to warrant, nevertheless do so, (in which case it has been seen, the warranty would not bind the principal,) the agent will be answerable; otherwise the buyer would be without remedy. (o)

So, where a broker, who was limited by his commission to the purchase of a particular kind of silk, having contracted on behalf of his principal for the purchase of a different kind, it was held, that his principal was not bound by the contract, but that he was himself liable to the sellers for the loss upon the re-sale. (p) So, if an agent undertake for his principal to pay a sum of money *without any authority*, he only is liable upon the promise. (q) Or, if without any authority he borrows money. (r)

6. OF THE RIGHTS AND REMEDIES BETWEEN PRINCIPAL, FACTOR, BROKER, OR AGENT *INTER SE*.

1. OF A FACTOR, BROKER, OR AGENT'S LIABILITY ON A PROMISE TO INDEMNIFY THE PRINCIPAL, &c.] — Where a broker buys goods for his principal, and agrees for a certain *per centage* to indemnify him from any loss on the re-sale of them; if the principal has a fair oppor-

(k) 2 Bl. 1072.

(l) *Appleton v. Binks*, 5 East Rep. 148.(m) *Clayhill v. Fitzgerald*, 1 Wils. 28.

58.

(n) 3 T. R. 761.

(o) 3 T. R. 761.

(p) 1 Esp. Rep. 111. and see 3 Term. Rep. 761.

(q) 3 P. Wms. 279.

(r) 1 Eq. Cas. Abr. 308.

tunity of selling the goods to advantage, but neglects it, the broker is discharged, though the principal afterwards sells them at a loss. (s)

So, an agent purchasing foreign bills for his principal, and indorsing them to him without any qualification, is liable to the principal on his indorsement, however small the commission may be which he gets upon the purchase. (t)

2. THE REMEDY AGAINST A FACTOR, BROKER, OR AGENT, FOR NOT DULY ACCOUNTING OR PAYING OVER MONEY TO HIS PRINCIPAL.]—Where the transactions between a factor, broker, or agent, involve mutual accounts, which require a long and laborious examination before the result can be ascertained, an action of account or bill in equity is the proper remedy (u); though an action at law will certainly lie for the balance of such account (v) or for damages for refusing to come to an account. (w) However in actions at law for the recovery of the balance of accounts between a factor and his principal, where the accounts have been long and intricate, and it has become necessary to enter into a protracted investigation of them at *Nisi Prius*, some judges have refused to try such causes, not only upon the ground that justice could not be done, it being almost impossible for the jury to enter into and examine minutely the accounts in detail; but because there are specific remedies open to the parties better adapted to do complete justice. (x)

3. WHEN A FACTOR, BROKER, OR AGENT IS ANSWERABLE FOR NEGLIGENCE, &c.]—If a merchant directs his factor or correspondent to insure, and he neglects doing so, he is liable to an action for this neglect of duty. Thus, in the case of *Smith v. Lascelles*, (y) which was an action on the case for neglecting to make an insurance on the freight of goods shipped from *Dominica* to *London*. The facts were, that the plaintiff, being indebted to the defendant in 850*l.* in *February* 1785, mortgaged to him his interest in the goods and freight, by way of security; in which mortgage was contained a proviso, that the deed should be void in case of payment in *August* 1785. In *July* 1785, the plaintiff in a letter inclosing the bills of lading, desired the defendant to procure an insurance on the goods and freight, which letter could not have been received before the mortgage became absolute. The defendant did cause insurance to be made on the goods, though not on the freight. At the trial, proof was given of a letter having been received by the

(s) *Curry v. Edenson*, 3 Term Rep. 524.

(t) *Goupy v. Harden*, 2 Marsh. Rep. 454. 7 Taunt Rep. 159. S.C.

(u) *Godfrey v. Saunders*, 3 Wils. Rep. 106. Eq. Cas. Abr. 5. Bac. Abr. tit. Accompt. 1 Salk. 9. Carth. 89. 1 Taunt. 572.

(v) 19 Mod. 591. Sty. 287. 1 Bro. Parl. Cas. 133. 8vo ed. 2 Stra. 1027.

(w) Carth. 89.

(x) Lord Holt, Carth. 89., and Lord Ellenborough, 2 Campb. Rep. 238. But see 5 Taunt. Rep. 432.

(y) 2 Term Rep. 187. See also *De-lancy v. Stoddart*, 1 Term Rep. 22. S.P.

defendant from the plaintiff, but it did not appear whether it was the letter in question. A verdict having been found for the plaintiff, a motion was made to set aside the verdict; but the court refused the rule, and held, that the plaintiff was entitled to recover. *Buller J.* said, "It is now settled as clear law, that there are three instances in which such an order to insure must be obeyed. First, where a merchant abroad has effects in the hands of his correspondent here, he has a right to expect that he will obey an order to insure, because he is entitled to call his money out of the other's hands when, and in what manner he pleases. The second class of cases is, where the merchant abroad has no effects in the hands of his correspondent, yet if the course of dealing between them be such, that the one has been used to send orders for insurance, and the other to comply with them, the former has a right to expect that his orders for insurance will still be obeyed, unless the latter give him notice to discontinue that course of dealing. Thirdly, if the merchant abroad send bills of lading to his correspondent here, he may engraft on them an order to insure, as the implied condition on which the bills of lading shall be accepted, which the other must obey if he accept them, for it is one entire transaction.

So, where a merchant here had accepted an order for insurance, and limited the broker to too small a premium, in consequence of which no insurance could be procured; the court held, that the merchant was liable to make good the loss to his correspondent.^(z) So, where a merchant directs his factor or correspondent to insure, and he charges him with it as if done, and a loss happens, he shall be charged as insurer; but if the factor employs an agent, this equity will not extend to that agent.^(a) But if an agent, to whom orders to insure are sent, does what is usual to get the insurance made, that is sufficient;^(b) because he is no insurer, and is not obliged to get insurance at all events. Thus, if he send to *Lloyd's*, and the underwriters refuse to take the risk at any premium; and he afterwards send to get insurance done at *Newcastle*, he has done his duty, and can never afterwards be charged in this action; more especially if the plaintiff adopt and approve his acts.

In order, however, to maintain an action on the case against an agent for negligence, the principal must show, that the agent was guilty either of a breach of *positive orders*, *gross negligence*, or *fraud*.^(c)

A banker in *London* receiving bills from his correspondents in the country, to whom they had been indorsed, to present for payment,

^(z) *Wallace v. Tellfair*, 2 Term. Rep. 188. n. a. ^(b) *Smith v. Cologan*, 2 Term Rep. 188. n. a.

^(a) *Tickel v. Short*, 2 Ves. 239

^(c) *Moor v. Mourgue*, Cowp. 479.

is not guilty of negligence in giving up such bills to the acceptor upon receiving a check upon a banker for the amount, although it turn out that such check is dishonoured. (d) So, where A. entrusted B. with goods to sell in *India*, agreeing to take back from B. what he should not be able to sell, and allowing him what he should obtain beyond a certain price, with liberty to sell them for what he could get, if he could not obtain that price. B. not being able to sell the goods in *India* himself, left them with an agent to be disposed of by him, directing the agent to remit the money to himself in *England*. It was held, (e) that A. could not maintain trover against B. for the goods.

3. OF THE FACTOR'S LIEN ON THE GOODS, &c. OF HIS PRINCIPAL.]—A factor has a lien on goods consigned to him, for the general balance due to him, as well as for incidental charges attending the particular goods in his hands: (f) but this lien remains though he may have parted with the actual possession of the goods. Thus, in the case of *Drinkwater v. Goodwin*, (g) however, it was held, that a factor has a lien on the price of the goods in the hands of the buyer; for though he has not the actual possession of them, yet if he has a power of giving a discharge, or bringing an action, he has a right to retain the money in consequence of his lien, as much as a mortgagee has by the title deeds of an estate in his hands, though he is not in possession. But though the general rule of law be, that a factor has a lien on the goods of his principal for his general balance, yet this, like other general rules, may be controlled by the agreement of the parties; as if A. deposit goods with B. for sale, and B. promise to pay the proceeds to A. when sold; B. has no lien on these goods (if not sold) for the balance of his general account arising upon other articles; the express stipulation in this case negating the general rule of law. (h)

So, a factor has no lien on goods for a general balance, unless they come into his *actual* possession. (i) And if a factor accept bills drawn by his principal upon the faith of consignments agreed to be made by the principal to the factor, and both of them become bankrupts before a cargo consigned come into possession of the factor, his assignees have no property in such cargo, and cannot recover the produce of it against the assignees of the principal, if they have sold it and received the purchase money. (k)

(d) *Russell v. Hankey*, 6 Term Rep. 12.

(e) *Bromley v. Coxwell*, 2 Bos. & Pul. 438.

(f) *Kruger v. Wilcocks*, Amb. 252. 1 Bur. 494. 1 Bl. Rep. 104. 1 East Rep. 4. & 6 East Rep. 21. n.a. 6 East, 23. in *notis*. S.C. See also *Lickbarrow v. Mason*, 2 Term Rep. 63.

(g) Cowp. 251.; and see Paley on Prin-

cipal and Agent, ch. 2. s. 3., where all the cases on this subject are collected.

(h) *Walker v. Birch*, 6 Term Rep. 258. See also *Skiffen v. Wray*, 6 East Rep. 371.

(i) *Kinloch v. Craig*, 3 Term Rep. 119.

(k) *Kinloch v. Craig*, 3 Term Rep. 783. 4 Bro. P.C. 47. 8vo. ed. S.C.

So, where a trader, after a secret act of bankruptcy, consigns goods to a factor, who advances money thereon; the latter has no lien on such goods, but must deliver them up to the assignees of the bankrupt trader. (l)

So, if A. employs a factor to sell goods he has no lien upon them, in respect of any debt due for other goods sold by him in *his own name* to A. on the account of another employer, previous to his being employed by A. (m) But the assignee of a policy of insurance on goods, who becomes such by the indorsement to him of the bill of lading of the goods by the consignor, after he had directed his correspondent to make the insurance, takes it subject to the lien of the correspondent of the consignor for his general balance; and can only claim, subject to that lien, the money received on such policy by the broker, in whose hands it was deposited for that purpose by the correspondent. But the broker has no *sub-lien* on the policy for the general balance of his own account with such correspondent, if he knew at the time that the policy was effected for another person. (n) So, where a principal gives notice to his factor of an intended consignment of a ship to him for the purpose of sale, and in consequence draws bills on him, which the factor accepts; and afterwards the principal dies, but his executors direct the captain of the ship to follow his former orders, who thereupon delivers the ship into the possession of the factor, who sells the same: it was held, that the factor has a lien upon the proceeds as well for the amount of money disbursed by him for the necessary use of the ship on its arrival, and for the acceptances by him actually paid, as for the amount of his outstanding acceptances not then due. (o)

4. IN WHAT CASES A FACTOR OR AGENT IS NOT ENTITLED TO RECOVER FOR COMMISSION, OR MONEY PAID, &c.] — In the case of *Hereford v. Powell*, (p) it was ruled by *Holt* Ch. J. "That where a factor abroad deserves money for factorage, he cannot bring an action for his factorage, unless the principal refuse to come to account; and if it appears that the factor hath money in his hands, he may detain, and cannot bring an action for his factorage: but if he were directed to vest all the produce of the adventure in wines, or other goods, then he might bring an action for his factorage, because he cannot detain, and hath no other remedy. So, a factor or agent shall not have any salary allowed him where he acts against the interest of his principal. (q) So, a broker who contracts with others for the sale of stock at a future day by the authority of his principal, who afterwards refuses to make good the

(l) *Copland v. Stein*, 8 Term Rep. 199.(o) *Hammonds v. Barclay*, 2 East Rep.(m) *Houghton v. Mathew*, 3 Bos. & Pul. 485.

227.

Pul. 485.

(p) *Holt's Rep.* 467.(n) *Man v. Shiffner*, 2 East Rep. 523.

(q) See 8 Bro. P. C. 339. 8vo. ed.

bargain, cannot, by paying the difference to such third persons, maintain an action on an implied *assumpsit* against his principal for the amount; such payment being considered voluntary, for which no action can be maintained. (r) So, where an agent pays money on account of his principal after his authority has been determined, he cannot recover it without an express promise to pay. (s)

(r) Vide *Child v. Morley*, 8 Term Rep. 610.

(s) *Edmiston v. Wright*, 1 Campb. Rep. 88.

CHAPTER IV.

OF CONTRACTS WITH AGENTS OF GOVERNMENT, OR OTHER PUBLIC BODIES ; OR WITH AN OFFICER IN THE ARMY ON BEHALF OF A REGIMENT, &c.

AN officer appointed by government, treating as an agent for the public, is not liable to be sued upon a contract made by him in that capacity, unless he make an absolute and unqualified undertaking to be *personally* responsible. This was determined in the case of *Macbeath v. Haldimand*,^(a) which was an action upon promises against the defendant, as agent, for work and labour. The cause was tried before *Buller* Just. and at the trial a verdict was found for the defendant, by the direction of the learned judge, under the following circumstances, which were reported to the Court of King's Bench, upon a motion for a new trial. In the year 1779, the defendant being governor of *Quebec*, appointed Captain *Sinclair* to the command of a fort called *Michilimakinac*, situated upon the lake *Huron*, in the province of *Canada*. On the 17th *August*, 1779, the defendant transmitted certain instructions to *Sinclair* respecting the government of the fort, in which he said, " You are to pay great attention to the *Indians* resorting to *Michilimakinac*, or furnished with necessaries from thence. Endeavour to preserve them in good humour ; and attach them by every means in your power to the king's interest." In a further part of the same instructions, he added, " You will draw bills of exchange for defraying the contingencies incident to that post, in the manner practised by Major *De Peyster*, (an officer on whom that command had been before conferred,) taking care to moderate and reduce those expenses, as far as can be done without injuring the king's service." And he concluded by stating, that " a *Mr. Macbeath*, who will deliver this letter, and who has just made application for a pass, was mentioned to me as a man of known and established integrity ; and, upon a more particular enquiry, I find that he

(a) 1 Term Rep. 172. Note, the rule of law laid down in this case, applies equally whether the contract be by *parol* or by *deed*. Vide *Unwin v. Walsley*, *Ib.* 674.

has always, both here and in the upper country, merited that character. I have proposed to him to supply the Crown with such quantities of *Indian* corn and grease as may be wanted for the necessary purposes at that post; and likewise all other articles which shall occasionally be wanted in the engineer department, which he has undertaken to do for 10*l.* *per cent.* on the market prices at the place (costs and charges); a profit which appears to be reasonable, inasmuch as it is greatly under that hitherto charged." Several special orders were proved from *Sinclair* to the plaintiff, for supplying particular articles, amongst which was the following, dated 1st of *August*, 1782: "You will be pleased for the future, without any requisitions in form, to provide for the different services of the post, in the manner least expensive to government, and still equal to the necessities of the different departments." In pursuance of these orders, the plaintiff furnished articles to a considerable amount. But when his bills, at the top of which was prefixed "Government debtor to *George Macbeath*, for sundries paid by order of Lieutenant Governor *Sinclair*," were sent to the defendant at *Quebec*, he made objections to several of the articles, as being unreasonable, and furnished contrary to subsequent instructions. Afterwards, on the 2d of *July*, 1784, *Mathews* (the defendant's secretary,) wrote the following letter to Messrs. *Dobie* and *Forsyth*, who were agents for the bill holders:—

"I am commanded by his Excellency General *Haldimand*, to acquaint you, that, in consequence of instructions from the Lord's Commissioners of his Majesty's Treasury, in answer to a representation made by him to their Lordships, concerning the bills drawn upon him by Lieutenant Governor *Sinclair*, in the year 1782, which he thought it necessary to refuse payment of, his Excellency, in conformity with the offer which he made to the holders of the said bills in the year 1782, is still willing to pay such parts of the charges, for which the said bills were drawn, as at that time appeared upon examination to be reasonable."

It was admitted at the trial and in court, that all the accounts had been submitted to a board of officers by the defendant, for them to examine and report what charges ought to be allowed, and that the sum adjudged by them to be due, which fell very short of the plaintiff's demand, had been paid by the treasury.

Buller J. after reporting the above facts, said, that he had been of opinion at the trial that the goods in question having been supplied for the use of government, and the defendant not having personally undertaken to pay, the plaintiff ought to be nonsuited: that it appeared to him that the plaintiff had acted with the defendant solely in the character of Commander in Chief, considering him as the agent of government: that all the letters imported it to be a transaction on the part of government; and that the accounts confirmed it. But the

plaintiff's counsel appearing for their client when he was called, he left the question to the jury, telling them that they were bound to find for the defendant in point of law. And upon their asking him whether, in the event of the defendant's not being liable, any other person was, he told them that was no part of their consideration; but, being willing to give them any information, he added, that he was of opinion that if the plaintiff's demand were just, his proper remedy was by a petition of right to the Crown. On which they found a verdict for the defendant. The rule for granting a new trial was moved for on the ground of misdirection of the Judge upon two points. First, that the defendant had, by his own conduct, made himself personally liable, which question should have been left to the jury. And secondly, that the plaintiff had no remedy against the Crown by a petition of right, on the supposition of which the jury had been induced to give their verdict.

Lord *Mansfield* Ch. J. declared that the Court did not feel it necessary for them to give any opinion on the second ground. His Lordship said, "that great difference had arisen since the revolution with respect to the expenditure of the public money. Before that period, all the public supplies were given to the king, who, in his individual capacity, contracted for all expenses. He alone had the disposition of the public money; but since that time, the supplies have been appropriated by parliament to particular purposes, and now whoever advances money for the public service trusts to the faith of parliament. That according to the tenor of Lord *Somers's* argument in the banker's case,* though a petition of right would lie, yet it would probably produce no effect. No benefit was ever derived from it in the banker's case; and parliament was afterwards obliged to provide a particular fund towards the payment of those debts. Whether, however, this alteration in the mode of distributing the supplies had made any difference in the law upon this subject, it was unnecessary to determine; at any rate, if there were a recovery against the Crown, application must be made to parliament, and it would come under the head of supplies for the year." And upon the first point, the Court determined, that the defendant having contracted with the plaintiff merely as the agent of government, was not *personally* liable. And his lordship added, "The only question before the Court is, whether the *defendant* be liable or not in this action? if he be, the plaintiff must recover; if not, no consideration respecting the plaintiff's remedy against any other party can induce the Court to make him so. There is no colour to say that he is liable in his character of Commander in Chief. In a late case which was tried before me, where one *Savage* brought an action against Lord *North*, as First Lord of the Treasury, in order that he might be reimbursed the

* Vide Vol. II. of State Trials, 59.

expenses which he had incurred in raising a regiment for the service of Government, I held that the action did not lie. So, in another case of *Lutterloh* against *Halsey*, which was an action brought against the defendant, who was a commissary, for the supply of forage for the army, and by whom the plaintiff had been employed in that service, the commissary was held not liable. In the present case it was notorious that the defendant did not *personally* contract; the plaintiff knew at the time that he furnished the stores, that they were for the use of government; and he afterwards made government debtor in his bills. But it has been urged that the defendant made himself liable after the debt was contracted. In my opinion there is no ground for such an argument: the evidence does not warrant it. Then it was objected, that whether the defendant had made himself liable or not, was a question which ought to have been left to the jury to decide. But there was no evidence which was proper for their consideration; for the evidence consisting altogether of written documents and letters, which were not denied, the import of them was matter of law and not of fact."

So, a captain of a troop is not *personally* liable for meat or forage supplied for his troop during his absence on duty, though ordered by his clerk, unless he actually receives the subsistence money from Government, or makes an absolute promise to be answerable *personally*. (b) So, in the case of *Rice v. Shute*, (c) it was determined that the captain of a troop, for which forage was furnished by the orders of a clerk appointed by such captain, is not liable in an action for money had and received for such forage, though present with the troop at the time; it not appearing that he had received any money for this purpose from the paymaster, to whom it is issued by Government, and upon whom the captain is entitled to draw for a certain sum, regulated by the returns of the preceding month. It is, however, reported, that there was another case of *Rice v. Everitt*, (d) determined at the same time, which was an action brought by the same plaintiff against the colonel of the same regiment, for forage furnished to his own particular troop. The evidence was in general the same as in the other case: but here it appeared that though the defendant had not drawn upon the paymaster of the regiment for the particular sum in demand, and so he could not be said to have received that sum to the plaintiff's use, yet the defendant being indebted to the paymaster on the balance of his own private account with him to the amount of two-thirds of the plaintiff's demand, and being also surety for the paymaster to Government, and the paymaster having absconded in a state of insol-

(b) *Myrtle v. Beaver*, 1 East Rep. 135.

(c) 1 East Rep. 579.

(d) 1 East Rep. 583. n.

vency, the Court refused to set aside a verdict recovered by the plaintiff for the amount of his debt, as the defendant was liable, in some shape or other, for the paymaster's default, and justice had upon the whole been done by the verdict.

So, a magistrate is not liable to pay for plans and estimates for building a county gaol upon an employment by him as one of a committee appointed under an order of sessions. (e)

But where an act of parliament was passed for making a river navigable, giving power to certain commissioners to raise and borrow money upon the tolls of the navigation, the acting commissioners gave orders at their meetings for work to be done in making cuts, &c. The work being completed, the commissioners declined paying, alleging that they had no trust-money left. The plaintiff filed a bill in Chancery against all the acting commissioners: and the Court held, the commissioners, who acted under the trust, to be personally liable to all the contracts, as well those which were made at the meetings when they were not present, as at those when they were. It was also said by the Court that the commissioners, having power to borrow money, ought to take care to be provided: that the workmen who engaged to do the work could not know the state of the fund, nor was it their business to enquire; they gave credit to the commissioners; the plaintiff could not be considered as giving credit to the success of the undertaking. (f)

So, where the commissioners of a navigation act entered into an agreement with an engineer, they were holden to be personally liable. (g)

So, where A. agreed with B. and C. to pave their streets; and they, on behalf of the parish, agreed to pay him; and the work being done according to the agreement, A. filed a bill in Chancery against B. and C., and it was held that they were liable, and must take their remedy over against the rest of the parish. (h)

(e) *Tuck v. Ruggles*, 5 Esp. Rep. 237.

(f) *Horsley v. Bell*, Ambl. 769. 772.

But see *Allen v. Waldegrave*, 8 Taunt. Rep. 566.

(g) *Ibid.*

(h) *Myriel v. Hymondsold*, Hardr. 205.

CHAPTER V.

OF CONTRACTS WITH COMMON CARRIERS, WHARFINGERS,
AND WAREHOUSEMEN: AND THEIR RESPECTIVE LIABILITIES
IN CASE OF LOSS OR DAMAGE OF GOODS ENTRUSTED
TO THEIR CARE.

A COMMON carrier is a person who carries goods for hire either by land or by water; and as such he is, by the common law, responsible for any loss or damage which may happen to them whilst under his care; and he is excused in no case except where the loss or damage happen either from inevitable accident, or, as it is not unfrequently called, the act of God; or, of the king's enemies. (a) Masters and owners of ships and other vessels, proprietors of stage coaches, wag-gons, &c. come under the denomination of common carriers, and are chargeable on the general custom of the realm, for their faults and miscarriages in the loss or damage of goods entrusted to their care. (b) So, if the proprietor of a stage-coach carries goods as well as passengers for hire, he shall be deemed a common carrier, and liable for the loss of goods, &c. (c) But a *hackney-coachman* is not a common carrier within the custom of the realm, and cannot be charged with the loss of a passenger's goods, except there be an express agreement, and money paid for the carriage of the goods. (d) So, the postmaster-general doth not come under the denomination of a common carrier: he hath no hire; enters into no contract. The post-office is a branch of revenue, and a branch of police created by act of parliament; the salary annexed to the office of postmaster is for no other consideration than the trouble of executing it. He is therefore not liable for any constructive negligence. (e) It has been observed, (f) that rigorous as this rule may seem, and hard as it may be in one or two particular instances, yet it is

(a) Rol. Abr. 2. 4 Co. 84. 2 Ld. Raym. 918. 1 Term Rep. 27.

(b) 1 Salk. 249. Bac. Abr. tit. Carriers, A.

(c) 2 Show. 128. 1 Salk. 282. pl. 11.; and see 2 Bos. & Pul. 419. 416.

(d) Com. Rep. 25.

(e) *Lane v. Cotton*, 1 Ld. Raym. 646. *Whitfield v. Lord Le Despencer*, Cowp. 754.

(f) Vide 1 Salk. 143. 2 Ld. Raym. 918. Jones's Law of Bailments, 105, 4. 95, 6.

founded on the great principle of public policy and convenience, to which all private considerations ought to yield; for the public are obliged to rely on the good conduct of carriers, whose education and morals are usually none of the best, and who might have frequent opportunities of associating with wicked and dishonest persons, while the injured person could seldom or never obtain legal proof of such combinations, or even of their *negligence*, if no actual fraud had been committed by them, to the infinite injury of commerce, and extreme inconvenience of society. Accordingly, it is laid down in the books, (g) that though a common carrier be robbed of the goods delivered to him, he shall answer for the value of them. And this liability arises at common law from the nature of the engagement or contract which he impliedly enters into when he receives goods to be delivered for hire. He is also considered in the nature of an *insurer*, and is liable for the loss of goods occasioned by fire, without any negligence in him or his servants. This point was settled in the case of *Forward v. Pittard*, (h) which was an action of *assumpsit* against the defendant as a common carrier, for not safely carrying and delivering the plaintiff's goods. A verdict was found for the plaintiff subject to the opinion of the Court of King's Bench on the following case: "The defendant was a common carrier from *London* to *Shaftsbury*. That on *Thursday* the 14th of *October*, 1784, the plaintiff delivered to him on *Weyhill* twelve pockets of hops to be carried by him to *Andover*, and to be by him forwarded to *Shaftsbury* by his public road waggon, which travels from *London* through *Andover* to *Shaftsbury*. That by the course of travelling, such waggon was not to leave *Andover* till the *Saturday* evening following. That in the night of the following day after the delivery of the hops, a fire broke out in a booth at the distance of one hundred yards from the booth in which the defendant had deposited the hops, which burnt for some time with unextinguishable violence, and during that time communicated itself to the said booth in which the defendant had deposited the hops, and entirely consumed them *without any actual negligence in the defendant*. That the fire was not occasioned by lightning." And the general question in this case was, whether a carrier was liable for the loss of goods occasioned by fire, without any negligence in him or his servants? And upon this question Lord *Mansfield* Ch. J. delivered the unanimous opinion of the Court, that the carrier was liable. He said: "It appears from all the cases for one hundred years back, that there are events for which the carrier is liable independent of his contract. By the nature of his contract, he is liable for all due care and diligence; and for any negligence he is suable on his contract. But there is a

(g) 1 Inst. 89. a. Mo. 462. 1 Rol. Abr. v. *The Trent and Mersey Navigation Company*, 5 Term Rep. 389.
2. C.

(h) 1 Term Rep. 27. See also *Hyde*

further degree of responsibility by the custom of the realm, that is, by the common law, a carrier is in the nature of an insurer. It is laid down that he is liable for every accident, except by the act of God, or the King's enemies. Now what is the act of God? I consider it to mean something in opposition to the act of man: for every thing is the act of God that happens by his permission; every thing by his knowledge. But to prevent litigation, collusion, and the necessity of going into circumstances impossible to be unravelled, the law presumes against the carrier, unless he shows that it was done by the King's enemies, or by such act as could not happen by the intervention of man, as storms, lightning, and tempests. In this case it does not appear but that the fire arose from the act of some man or other. It certainly did arise from some act of man; for it is expressly stated not to have happened by lightning. The carrier therefore, in this case, is liable, inasmuch as he is liable for inevitable accident."

But in the case of *Garside v. The Proprietors of the Trent and Mersey Navigation*, (i) where a common carrier between A. and B. was employed to carry goods from A. to B. to be forwarded to C.; the goods were safely delivered by him at B., and there put into his warehouse, until they could be delivered to another carrier from B. to C.; but whilst the goods were in the warehouse, they were destroyed by an accidental fire; the Court of King's Bench determined, that whilst the goods remained in the warehouse the carrier was to be considered merely as a warehouseman, and therefore not responsible for the loss. And Lord Kenyon Ch. J. said, "The case of a carrier stands by itself upon peculiar grounds; he is held responsible as an insurer, and the reason given in the books (whether well or ill founded is immaterial here) is to prevent fraud. But I do not see how we can couple the character of the carrier with that of the warehouseman, in which last the defendants are not liable here, they not having been guilty of laches." And Buller Just. observed, "The keeping of the goods in the warehouse is not for the convenience of the carrier, but of the owner of the goods; for when the voyage to Manchester is performed, it is the interest of the carrier to get rid of them directly; and it was only because there was no person ready at Manchester to receive these goods that the defendants were obliged to keep them."

A delivery of goods to a common carrier, who accepts a box with goods and money in it, is liable to the full extent of the loss or damage happening to them, though he be ignorant of its contents; unless he make a special acceptance. Thus, in the case of *Kenrig v. Eggleston*, (k) which was an action upon the case against a country carrier for not de-

(i) 4 Term Rep. 581. Vide the case of *Hyde v. The Trent and Mersey Navigation Company*, 5 Term Rep. 389.

(k) Aleyn, 93.

livering a box with goods and money in it. The evidence was, that the plaintiff delivered the box to the carrier's porter, whom he appointed to receive goods for him, and told the porter that there was a book and tobacco in the box, and in truth there was an hundred pounds in it besides. And it was agreed by the counsel, and given in charge to the jury, that if a box with money in it be delivered to a carrier, he is bound to answer for it if he be robbed, although it was not told him what was in it. And so it was ruled in one *Barcroft's* case, as *Roll* said, where a box of jewels was delivered to a ferry-man, who knowing not what was in it, and being in a tempest, threw it overboard into the sea, and resolved that he should answer for it. And *Roll* Just. directed the jury, "That although the plaintiff did tell him of some things in the box only, and not of the money, yet he must answer for it; for he need not tell the carrier all the particulars in the box. But it must come on the carrier's part to make special acceptance. But in respect of the intended cheat to the carrier, he told the jury they might consider him in damages." But in the case of *Sir Joseph Tyly* and others v. *Morrice*, (k) two bags of money sealed up were delivered to the defendant's book-keeper; the plaintiff's servant told him that it was 200*l.*, and desired a receipt for the money; thereupon the book-keeper gave a receipt for his master to this effect: "Received of, &c. two bags of money sealed up, said to contain 200*l.*, which I promise to deliver on such a day at *Exeter* unto *T. Davies*, he to pay 10*s.* per cent. for carriage and risk." The carrier was robbed of this and other money on *Hounslow Heath* in the night time, but he paid 200*l.* to *Davies* at *Exeter*. And now an action was brought against him in common form upon the custom of *England*, wherein the plaintiffs declared, that on such a day and place they had delivered unto the defendant 450*l.* to be carried from *London* to *Exeter*, &c.; and at the trial it was proved, that there was full 450*l.* in gold and silver contained in those two bags at the time they were delivered to the carrier for 200*l.* And the question was, whether the carrier should answer for the whole money? *Holt* Ch. J. was of opinion that he should answer for no more than 200*l.*, (which was acknowledged that he had paid to *Davies*,) because in this case there was a particular undertaking by the carrier for the carriage of 200*l.* only, and his reward was to extend no farther than that sum, and it is the reward which makes the carrier answerable; and since the plaintiffs had taken this course to defraud the carrier of his reward, they had thereby barred themselves of that remedy which is founded only on the reward. So the jury was directed to find for the defendant.

So a carrier is not answerable for the loss of goods from a risk to which the customer, when he delivered them, knew that they were likely

(k) *Carth.* 35.

to be exposed, and of which circumstance he did not inform the carrier. (l)

So, in the case of *Gibbon v. Paynton* and another, (m) which was an action against the *Birmingham* stage-coachman, for 100*l.* in money, sent from *Birmingham* to *London* by his coach, and lost. It was hid in hay in an old nail-bag, the bag and the hay arrived safe; but the money was gone. The coachman had inserted an advertisement in a *Birmingham* newspaper, with a *nota bene*, "That the coachman would not be answerable for any money or jewels, or other valuable goods, unless he had notice that it was money or jewels, or valuable goods, that was delivered to him to be carried." He had also distributed hand-bills of the same import. It was notorious in that country, that the price of carrying money from *Birmingham* to *London* was 3*d.* in the pound, the plaintiff was a dealer at *Birmingham*, and had frequently sent goods from thence: it was proved that he had been used for a year and a half to read the newspaper in which this advertisement was published; though it could not be proved that he had ever actually read or seen the individual paper wherein it was inserted. A letter of the plaintiff's was also produced, from whence it manifestly appeared that he knew the course of this trade, and that money was not carried from that place to *London* at the common and ordinary price of the carriage of other goods: and it likewise appeared from this letter, that he was conscious that he could not recover by reason of his concealment. The jury found a verdict for the defendant. But the plaintiff afterwards moved for a new trial; the Court, however, were clearly of opinion, that the verdict was right, and therefore refused the rule. Lord *Mansfield* Ch. J. distinguished between the case of a common carrier, and that of a bailee, and said: "The latter is only obliged to keep the goods with as much diligence and caution as he would keep his own: but a common carrier, in respect of the premium he is to receive, runs the risk of them, and must make good the loss, though it happen without any fault in him; the reward making him answerable for their safe delivery. This action is brought against the defendant upon the foot of being a common carrier. His warranty and insurance is in respect of the reward he is to receive: and the reward ought to be proportionable to the risk; if he makes a greater warranty and insurance, he will take greater care, use more caution, and be at the expence of more guards, or other methods of security: and therefore he ought, in reason and justice, to have a greater reward. Consequently, if the owner of the goods has been guilty of a fraud upon the carrier, such fraud ought to excuse the carrier, and here the owner was guilty of fraud upon him: the proof of it is over-abundant. The plaintiff is a dealer at *Birmingham*, the price of the carriage of money

(l) *Edwards v. Sherratt*, 1 East Rep. 604. (m) 4 Burr. 2298.

from thence is notorious in that place: it is the rule of every carrier there; it is fairly presumed that a man conversant in a trade knows the terms of it; therefore the jury were in the right, in presuming that this man knew it; the advertisement and hand-bills were circumstances proper to be left to the jury, the plaintiff's having been used, for a year and a half, to read this newspaper is a strong circumstance for the jury to ground a presumption that he knew of the advertisement; then his own letter strongly infers his consciousness of his own fraud, and that he meant to cheat the carrier of his hire; therefore, I entirely agree with the jury in their verdict." And *Yates* Just. said, "A carrier may make a *special* acceptance; and that this was a special acceptance. By the general custom of the realm, a common carrier insures the goods at all events: and it is right and reasonable that he should do so: but he may make a special contract; or he may refuse to contract in extraordinary cases but upon extraordinary terms."

And accordingly in the case of *Clay v. Willan* and others, (n) where it appeared that the defendants were proprietors of a stage coach, by which the plaintiff sent a quantity of light guineas to be carried from *Wakefield to London*, 2s. were paid for the carriage, and 2d. for booking; and the following were the printed terms on which the defendants performed their business: "*Willan* and Co. humbly beg leave to inform their friends and the public, that cash, plate and jewels, writings, or any such kind of valuable articles, will not be accounted for if lost, of more than 5*l.* value, unless entered as such, and a penny insurance paid for each pound value, when delivered to the book-keeper, or other person in trust, to be conveyed by any carriage that inns at the above inn." The parcel was lost, and the action was brought for the amount. But at the trial, the plaintiff was nonsuited, it being proved that the person by whom he sent the parcel to the inn, knew of the above terms, but had not discovered the contents of the parcel to the book-keeper, nor paid for them as valuables. And, upon a rule to show cause why the nonsuit should not be set aside, and a verdict entered for the plaintiff, on the ground that he was entitled to recover as far as 5*l.* by the printed conditions; the Court declared, that the sense of the printed conditions seemed to be, that the defendants were not liable to any extent, unless the parcel had been entered and paid for as valuable; and therefore the rule for setting aside the nonsuit was discharged.

So, in the case of *Izett v. Mountain*, (o) where the notice was in these words: "The proprietors of coaches from this inn will not be accountable for any parcels, &c. of more value than 5*l.*, unless entered as such, and paid for accordingly;" it was determined, in an action against the carrier, that the plaintiff was not entitled to recover any thing.

(n) 1 H. Bl. 298.

(o) 4 East Rep. 371.

So, in the case of *Nicholson and another v. Willan and another*, (p) where it appeared, that the defendants were proprietors of two coaches travelling from *Leeds* through *Nottingham*, to *London*, the one a mail coach, the other a heavy coach which went out six hours later every day than the mail coach. The parcel in question, containing goods to the value of 58*l.* was (as a witness for the plaintiffs proved, and which the jury found to be true,) delivered and accepted to be carried by the mail coach. It appeared, however, to have been booked to go by the heavy coach, and to have been afterwards lost, but whether in a course of conveyance by the heavy coach, or out of the warehouse, or how otherwise, did not appear. It was proved, that the defendants had for some time before put up an advertisement on a board in their office at *Nottingham*, and of which the plaintiffs were also proved to have had notice, in the following terms: "Take notice, that the proprietors of coaches transacting business at this office will not be accountable for any passenger's luggage, money, plates, jewels, watches, writings, goods, or any package whatever, (if lost or damaged,) above the value of 5*l.* unless insured and paid for at the time of delivery, and demanded in one month, after such damage is sustained." Lord *Ellenborough* Ch. J. delivered the judgment of the Court upon this case, in favour of the defendants. He said, "On the part of the plaintiffs it was contended that they were entitled to recover the 58*l.* the value of the goods, notwithstanding the notice given by the advertisement, which excludes from the carrier's general responsibility for the same at common law, all goods above the value of 5*l.* unless the terms therein specified, namely, of insuring and paying for the goods at the time of delivery, should be complied with, and which was not done in this instance. The ground on which they so contended was that the loss in question was one not incurred in the course of their employment as carriers, but occasioned by an act of tortious conversion, in direct contravention of the terms on which the goods were delivered to, and accepted by them. But to found this argument there was no other evidence but the mere fact of the booking of the goods for a different coach, and a subsequent non-delivery, which can amount to no more than a negligent discharge of duty in their character of carriers, and not to an entire renunciation of that character, and of the duties attached to it, so as to make them guilty of a distinct tortious misfeasance, in respect to the goods in question. It was also contended, on the part of the plaintiffs, that such a special acceptance of goods, by a common carrier, as is contained in the defendant's notice, is contrary to the policy of the common law, which has made common carriers responsible to an indefinite extent, for losses not occasioned by the only excepted

causes of loss, viz. "The act of God, and the king's enemies." But considering the length of time during which, and the extent and universality in which the practice of making such special acceptances of goods, for carriage by land and water, has now prevailed in this kingdom, under the observation, and with the allowance of courts of justice, and with the sanction also and countenance of the legislature itself, which is known to have rejected a bill brought in for the purpose of narrowing the carrier's responsibility in certain cases, on the grounds of such a measure being unnecessary, in as much as the carriers were deemed fully competent to limit their own responsibility in all cases by special contract: considering also, that there is no case to be met with in the books, in which the right of a carrier thus to limit, by special contract, his own responsibility has ever been, by express decision, denied, we cannot do otherwise than sustain such a right in the present instance, however liable to abuse and productive of inconvenience it may be; leaving to the legislature, if it shall think fit, to apply such remedy hereafter as the evil may require. In the absence, therefore, of any evidence to support the plaintiff's claim, as founded upon a supposed tortious conversion of the goods in question, and of any valid objection, in point of law, to the special terms of acceptance contained in the defendant's, the carrier's notice, we cannot help giving effect to those terms in the notice; by which, in as much as the goods in question were above the value of 5*l.* and not insured and paid for at the time of delivery, the plaintiffs are not accountable for the same: and of course the verdict, given for the 5*l.* must be set aside, and a nonsuit entered."

But in all cases of notice, it is necessary for the carrier to be prepared to prove, that the notice was put up in some conspicuous part of his office, in clear and legible characters, so that the party delivering the goods might have seen and known of it by common and ordinary observation. For in the case of *Butler v. Heane*, (q) which was an action against a carrier, to recover the value of a trunk sent by the defendant's waggon from *Cheltenham* to *London*, but the same was lost. At the latter place a board was fixed in the office, giving the usual notice; but at the former place, where it had been delivered, the only mode of publishing this notice was by a hand-bill, stating in a large print, the advantages of sending by this waggon; but the notice in a very small character at the bottom. Lord *Ellenborough* Ch. J. said, "This is not sufficient evidence of a special contract to limit the defendant's common law liability. The jury ought to believe, that the plaintiff or his agent, at the time of delivery, saw, or had ample means of seeing, the terms on which the defendant carries on his business. How can this be inferred from a bill

(q) 2 Campb. Rep. 415. and see *Clark v. Gray*, 4 Esp. Rep. 177.

nailed on the door, which called the attention to every thing attractive, and concealed what was calculated to repel customers. If a carrier is to be allowed to limit his responsibility, he must take care that every one who deals with him is fully informed of the limits to which he confines it. So, in *Clayton v. Hunt*, (r) which was an action against a carrier for the loss of a box of wearing apparel, to be carried from *Oxford* to *London*, which had been delivered to a servant of the defendant, who went round the town to collect goods, &c. A printed bill was stuck up in the office where the business was transacted, and cards of a similar purport had been circulated, together with advertisements in the *Oxford* newspapers, but no notice was affixed on the cart, and there was no evidence that the plaintiff had ever seen any of the notices; the carrier was held not to be discharged from his liability; and the court refused a new trial, saying, "that the notice in the office ought to be in such large characters, that no person delivering goods there, can fail to read it without gross negligence; and that if a carrier's servant receives goods at a distance from the office, the special terms on which he deals ought to be communicated through some other medium."

So in *Cobden v. Bolton*, (s) which was an action against the proprietor of a coach, to recover the value of a broach and ring sent by his coach; in answer to which, evidence was given of an examined copy of a board fixed in the office, stating that the coach-owners, &c. would not be liable for jewels, &c., however small in value, unless notice was given and paid for as such; but it was proved, that in the printed hand-bill circulated by the defendant, it was only said generally, that "they would not be answerable for more than 5*l.* unless, &c." But Lord *Ellenborough* Ch. J. said, "The printed paper in circulation dispensed with any necessity to attend to the notice in the office. I have a right to presume, that what is circulated by his authority, contains the whole of the limitations he intends to put on his common law responsibility as a carrier, and gives a full statement of the special contract into which he enters with his customers;" and he directed the jury to find a verdict for the plaintiff, which they accordingly did. But where the terms of a particular notice have been recognized by the owner of the goods, or he has been informed of them, he is bound by the notice. This was settled in the case of *Clay v. Willan*, just cited, (t) where it appeared that the defendants were proprietors of a stage-coach, by which the plaintiff sent a quantity of light guineas from *Wakefield* to *London*; two shillings for the carriage, and two-pence for booking were paid at the time of the delivery. But it being proved, that the person by whom the plaintiff sent the parcel to the inn knew of the usual terms, and had not discovered the con-

(r) 3 Campb. 27.

(s) 2 Campb. 108.

(t) Ante, 573. See also 1 Stark. Rep. 73. 186.

tents of the parcel, nor paid for them as valuables, the plaintiff was nonsuited.

So, in the case of *Alfred v. Horne* (x), which was an action brought to recover the value of a lost parcel. The plaintiffs, who were jewellers residing in *London*, were in the habit of receiving goods from an agent of theirs at *Wisbeach* in *Suffolk*. The parcel in question, containing articles of jewellery, was delivered by a servant of the plaintiff's agent at *Wisbeach*, to the defendant's book-keeper there, and 1s. 6d. was paid for the carriage, and 2d. for the booking. The coachman received the parcel, and was told that it was a parcel of value. The parcel was afterwards lost. The defendant proved, that the plaintiff had received printed notices in *London*, from the *Golden Cross, Charing Cross*, where the coach set out, in the usual form, viz. "that the defendant would not be liable for any goods exceeding 5*l.* in value, unless paid for accordingly, delivered either there, or to their agents in the country. But no evidence was offered to prove that such notice was given at *Wisbeach*. *Abbott* Ch. J. held, "that it was sufficient that the plaintiff had received the notice in *London*, and that the circumstance of the coachman having been informed at the time of the delivery of the parcel to him at *Wisbeach*, that it was of value, did not amount to a waiver." And his Lordship added, "that there had been no case in which it had been decided, that the effect of a notice had been done away with by the mere circumstance that the carrier knew the value of the contents of the parcel." The plaintiff was therefore nonsuited.

These notices, however, may be waived by the carrier's acceptance of goods, which are of such a description, as to put him upon his guard whether he will accept them without being paid an extra price, &c. Thus in the case of *Beck v. Evans*, (y) which was an action on the case against the defendants as common carriers, for so negligently carrying a cask of brandy, that the greater part was lost. It appeared, that the waggoner was informed of the cask leaking, but never took any step to prevent it, although he stopped several hours at *Birmingham* and other places, and only took the cask out when he had other parcels to deliver. The principal ground of defence was a notice in these terms. "The proprietors of the *London* and *Salop* waggons give this public notice, that they will not be answerable for cash, &c. &c., or any other goods of what nature or kind soever, above the value of five pounds, if lost, stolen, or damaged, unless a special agreement is made, and an adequate premium paid over and above the common carriage," &c. To this it was said by *Le Blanc* J., "The exemption of carriers from general liability, by reason of notices of this sort, has been carried to the utmost

(x) 3 Stark. Rep. 186.

(y) 16 East Rep. 244. But see *Levi v. Waterhouse*, 1 Price's Rep. 280,

extent, and cannot be supported on any other ground than this, that they shall not be held liable to a large amount, when they only get a small reward for the carriage; they are, therefore, exempted from liability, where the goods are of a much larger value, than from a knowledge of their bulk or quality they could probably guess them to be. But that cannot apply to goods of a large bulk and known quality, where the value must be obvious." And Lord *Ellenborough* Ch. J. said, "If goods are confided to a carrier and it is proved that he has misconducted himself in not performing a duty, which, by his servant he was bound to perform, that is such a misfeasance, as if the goods thereby become damaged, his notice will not protect him from."

So, in *Wilson v. Freeman*, (x) which was also an action against a carrier, for negligence in conveying a looking-glass. The packing-case was marked *glass*; and, on delivering it at the office, the book-keeper was informed of its value, and desired to charge what he pleased for it, but only sixpence booking was paid. And the defence was, that the notice required such articles to be paid for as such when delivered. But Lord *Ellenborough* Ch. J. held, "That as the book-keeper knew what the article was, as well as its value, and was desired to charge what he pleased, the payment of the money was dispensed with, and the notice was unavailing."

So, a carrier is liable for gross negligence, notwithstanding these notices, and the degree of negligence is a question to be left to the jury, under all the circumstances; thus, in the case *Bodenham v. Bennett*, (y) where a parcel of Welsh notes were sent by the defendant's stage-coach from *Hereford* to *Brecon*; the plaintiffs were bankers at *Hereford*. These parcels were always sealed in a particular manner, and the book-keeper knew that they contained Welsh notes. On the 17th of *August*, 1815, the plaintiff's clerk took a parcel, sealed in the usual manner, containing notes to the amount of 347*l.* 11*s.* to the coach-office, to go by the coach to *Brecon* on the following morning; he paid for the carriage and booking, but no insurance was demanded or paid. On the following morning the parcel was entered in the way-bill, and put in the back seat of the coach; there were two other parcels also entered in the way-bill. There were no inside passengers when the coach left *Hereford*. When the coach arrived at *Brecon*, the book-keeper there, who usually unloaded the coach, received the way-bill, and took the two other parcels out of the front seat of the coach, but he did not look for the bank parcel, because the coachman usually carried those kind of parcels in his side-pocket. The coachman on that day was intoxicated, but not so as to be unable to attend to his business. After waiting a quarter

(x) 3 Campb. Rep. 527.

(y) 4 Price Rep. 51.

of an hour at *Brecon*, the coach proceeded on to *Carmarthen*; the parcel was lost, but the defendants proved the usual notice, that they would not be liable above 5*l.* value, unless insured and paid for accordingly. The learned judge stated to the jury the common law liability of carriers, and that they might stipulate to restrain it by notice. That they had given such a notice in this case, and therefore the question was, whether there had been gross negligence in the carrying of this parcel. He then detailed the evidence to the jury, who found for the plaintiffs to the amount of the notes. Upon a motion for a new trial, the Court refused the rule; and Mr. Baron *Wood* said, "I see no ground to disturb the verdict. By the common law, the carrier was liable from losses arising from accident or robbery; nay, from irresistible force. The case of *Morse v. Sluc*, (z) pressed extremely hard on common carriers. Then special conditions were introduced for the purpose of protecting carriers from extraordinary events, but they were not meant to exempt them from due and ordinary care. It cannot be supposed, that people would entrust their goods to carriers on such terms. It only means, that they will not be answerable for extraordinary events; but we need not, in this case, lay down that rule. Here has been gross negligence, and in all cases of that sort carriers are liable." So, in the case of *Birkett v. Willan*, (a) where, though a similar notice of exemption was given, as in the last case, yet the defendant was held responsible for the negligent delivery of a parcel of value to a labouring man, a stranger, who enquired for the parcel at the office, and paid for the carriage of it, he having been employed by a person in the street, who gave him 6*d.* for his trouble, and fraudulently run away with the parcel. So, if, in the course of delivery, a parcel is lost out of a cart standing in a public street, without any one being left in the care of it, the carrier is answerable. (b)

So, if goods are delivered to a carrier at an intermediate stage, and they are afterwards lost, the carrier is liable, though he may have given a notice at the place where his waggon sets off, and also at the ultimate place of his destination, limiting his responsibility. (c) So, where a carrier gives two notices, limiting his responsibility differently, he shall be bound by the one which is the least beneficial to himself. (d) So, a carrier is liable where he sends a parcel, which is afterwards lost, by a different coach to that which is specially named and appointed by the owner of the parcel. (e)

(z) 1 Ventr. 190.

(c) *Gouger v. Jolly*, Holt, N.P. Rep.

(a) 2 Barn. & Ald. Rep. 356, See also 317.

Duff v. Budd, 6 Mo. 469.(d) *Munn v. Baker* 2 Stark. Rep. 255.(b) *Smith v. Horne*, 2 Mo. Rep. 18.(e) *Garnett v. Willan*, 5 Barn. & Ald. 53.See also *Batson v. Donovan*, 4 Barn. & Ald. 21.

In the case of *Yate v. Willan*, (f) it was held that the payment of money into court upon a count, stating a special contract, is an admission of such contract, and narrows the inquiry to the quantum of damages sustained by the breach thereof. Therefore, if the plaintiff declare as upon a general undertaking by the defendant to carry goods for hire, on which the defendant pays 5*l.* into court, the latter cannot give in evidence that the contract was that he should not be answerable for goods lost to a greater value than five pounds, unless entered and paid for accordingly: though if no money had been paid into court, the plaintiff must have been nonsuited upon such evidence.

2. OF THE DELIVERY OF GOODS TO A CARRIER, AND OF HIS ACCEPTANCE THEREOF.]—Where goods are to be conveyed by a common carrier, they should regularly be left at the usual booking office and there entered and paid for; it having been held, that the mere leaving of goods at an inn yard, from whence a carrier sets out, is no delivery to or for the carrier: thus in *Selway v. Holloway*, (g) where it appeared that a parcel of hops were left at the inn where *Holloway* lodged, without proving any delivery to *Holloway* or his servant; but only to a woman (who had served *Holloway* before, but had quitted his service for five years) who said to the carman, if he laid them down, *Holloway* would find them. And upon the trial, it was proved, that there were many carriers who lodged at the same inn, but none of them went out the same day. A verdict was found for the defendant; and upon a motion for a new trial the court were all of opinion, “that the hops could not be said to be delivered to *Holloway*; and therefore a new trial was denied: but if goods are delivered to a carrier’s servant or agent, whom he appoints to receive goods for him, this is a sufficient delivery to, and acceptance of them by the carrier.”

But a parcel delivered to the driver of a stage coach is a sufficient delivery to bind the master, and to excuse the driver. (h)

3. OF THE CARRIER’S LIABILITY TO DELIVER GOODS TO THE CONSIGNEE’S PREMISES.]—In general where goods are brought by a common carrier to an inn yard or other usual place of deposit, the carrier is bound to deliver them to the place directed; particularly where portorage is usually charged. This point was determined, in the case of *Golden v. Manning*, (i) where the following facts were stated for the

(f) 2 East Rep. 108. See also *Clarke & Gray*, 6 East, 564, where it was determined, that the five pounds may be recovered upon a declaration drawn in the common form, without stating the notice as part of the contract.

(g) 1 Lord Raym. 46.

(h) *Williams v. Cranston*, 2 Stark. Rep. 82.

(i) 3 Wil. 429. 2 Bl. Rep. 916. S. C. See also the case of *Hyde* and another v. *The Trent and Mersey Navigation Company*, 5 Term Rep. 389, where three of the Judges thought the carrier was bound to deliver the goods to the owner; but Lord *Kenyon* Ch.J. inclined to a contrary opinion.

opinion of the Court: "The defendants were common carriers from *Birmingham* to *London*; that on the 7th day of *June*, 1771, they received a box, containing two pieces of silk, consisting of 119 yards, directed to Mr. *Samuel Ireland*, *Princes Street, Spitalfields, London*; that the box came to the defendant's warehouse, in *London*, on the 8th of *June* following, with no legible directions upon it, where it remained for the space of a year; at which time the plaintiff and *Ireland*, settling their accounts together, discovered the mistake of this box having been sent by the *Birmingham* coach, and of its not being delivered: upon which the plaintiff and *Ireland* went to the warehouse, and found the box; and upon opening it, a letter of advice from the plaintiff to him (*Ireland*) was found therein; and the silks then appeared to be damaged to the amount of 29*l.* 14*s.*; and for that reason plaintiff and *Ireland* refused to take the box and silks upon their being offered to them; and the defendant, *Manning*, refused to make any satisfaction for the damage; that the defendant, before the said time, neither delivered the goods, nor gave any intelligence to *Ireland* of the arrival of the box at the warehouse; that the name of *Samuel Ireland*, and place of his abode, appear in a printed book, being a directory, containing the names and places of abode of merchants and traders, which book they, the defendants, had in their warehouse; that the way-bill in the defendant's custody and possession contained the name of *Samuel Ireland*, and no further directions; that no enquiry was made at the defendant's warehouse at *Birmingham* of the plaintiff, to know where *Ireland* lived; nor was any enquiry made according to the directory; and that defendants hire a porter, at a stated salary by the week, to carry out goods which come by their coach, and receive the portorage of such goods as are sent out by the said porter."

The Court gave judgment for the plaintiff and said, "We are to determine this case upon the facts and particular circumstances therein stated; so there is no necessity for us to consider of the laws in general respecting carriers. It is stated to us, that these defendants hire a porter, at a stated salary by the week, to carry out goods which come by their coach, and receive the portorage of such goods as are sent out by that porter; therefore we apprehend we are bound to say, that the defendants were obliged to send the goods by their porter to be delivered at *Samuel Ireland's* house in *Princes Street, Spitalfields*, according to the direction, and the promise and undertaking laid in the declaration; as the defendants constantly kept a porter for this purpose, they engaged, and specially undertook (in this particular case) to deliver the goods to Mr. *Ireland*, by their porter. There can be no doubt but carriers are obliged to send notice to persons to whom goods are directed, of the arrival of those goods within a reasonable time, and must take special care that the goods be delivered to the right

person. It was by the negligence of the defendants that the direction of the box was obliterated. The master of a stage-coach takes a greater price for the carriage of goods than other carriers; so he is certainly bound either to send out the goods from his warehouse, in *London*, to be delivered to the persons to whom the same are directed, or to send notice of the arrival thereof within a reasonable time. If the defendants in this case were to be asked, in what manner they usually deliver goods at *London*, they would answer, "We always keep a porter at *London*, by whom we send out the goods to be delivered to the persons to whom the same are directed." Our opinion is confined to this particular case only.

4. BY AND AGAINST WHOM THE ACTION SHOULD BE BROUGHT FOR THE LOSS OF A PARCEL, &c.]—In actions against common carriers for the loss or damage of goods entrusted to their care, it is frequently made a question in whose name the action must be brought, whether in the name of the consignor or consignee? There are several cases reported on this point, and the result of them seems to be, that where the consignor is to pay for the carriage of the goods, and cannot charge the consignee upon the delivery to the carrier, the action should be brought in his name; but where the consignee orders the goods to be sent by a particular carrier, to whom they are delivered, or is liable, in the ordinary course of trade, to pay for them upon the delivery to the carrier, the action must, in general, be brought in the name of the consignee. Thus in the case of *Davis v. James*, (*k*) which was an action against a common carrier, for not delivering goods sent by him: and the only question was, "in whose name the action ought to have been brought?" The fact was, that *Davis* and *Jordan*, the present plaintiffs, were manufacturers of cloth at *Shipton Mallet*, and their declaration charged, that being possessed of cloth as of their own proper goods, delivered the same to the defendant being the common carrier, &c., and requested him to deliver it safely and securely for them, to one *Elizabeth Bowman*, at the *Three Nuns* at *Whitechapel*; which they undertook to do, for a reasonable price payable and paid by the said plaintiffs to the defendant, but the goods were lost and never delivered; the defendant pleaded not guilty, and the plaintiffs obtained a verdict. And upon an objection being made that the action ought to have been brought in the name of the consignee of the goods and not by the consignors, the court determined that the action was properly brought: and Lord *Mangfield* Ch. J. said: "This is an action upon the agreement between the plaintiffs and the carrier; the plaintiffs were to pay him; therefore the action is properly brought by the persons who agreed with him, and were to pay him."

(*k*) 5 Burr, 2680.

So, in the case of *Moore and others v. Wilson*, (l) which was an action of *assumpsit*: and the declaration stated, that the defendant undertook to carry the goods for a certain hire and reward to be paid by the plaintiffs. It was proved, at the trial, that *Clarke*, the consignee had agreed with the plaintiffs to pay the carriage of the goods, which the defendant's counsel contended did not prove the declaration. And *Buller J.*, before whom the cause was tried, being of that opinion, nonsuited the plaintiffs. But a motion was afterwards made for a rule to show cause why the nonsuit should not be set aside, on the ground that the allegation that the hire was to be paid by the plaintiffs was immaterial, and that in all cases of this kind the contract was virtually made between the carrier and the sender of the goods; that no private agreement between the consignor and the consignee could vary the question as between the consignor and the carrier; that though the consignor might have parted with the property in the goods, he might maintain an action against the carrier. But at all events the consignor might be considered as the agent of the consignee for the purpose of bringing this action. *Buller Just.* said: "That on considering the question he found he had been mistaken in point of law; for that whatever might be the contract between the vendor and vendee, the agreement for the carriage was between the carrier and the vendor, the latter of whom was by law liable." And the other two judges being of the same opinion, the rule was made absolute without further argument.

But in the case of *Daves v. Peck*, (m) where the plaintiff proved his case by showing the delivery of the goods to a person employed by the defendant at the usual place, where they were booked to be sent by the defendant's waggon, and the usual price paid for booking by the plaintiff's servant. The casks were "directed to Mr. *Odey*, *Hillmorton* near *Rugby*, *Warwickshire*, by *Peck's* waggon." It appeared that they were afterwards sent by the waggon and were left at the *Crown Inn* at *West Haddon*, which was the nearest place to *Hillmorton* in the road which the waggon travelled; and where, after lying some time, they were seized in consequence of the time mentioned in the permit for their removal being expired. The merits of the case as between the plaintiff and *Odey*, the consignee, or in respect of the legality of the seizure were not entered into: but the defendant's counsel, in opening his case to the jury, read a letter from the plaintiff to *Odey*, after the seizure was known, in which he said that the liquors sent "were in quantity and prices exactly conformable to your (*Odey's*) order: but by what authority they were ever left at the *Crown Inn* at *West Haddon*

(l) 1 Term Rep. 659.

(m) 8 Term Rep. 530. See also 1 Atk. 248. S. P.

remains for the innkeeper, or the carrier, to explain or account for. All I have to observe is this, that the goods *having been sent conformable to your orders, and by the carrier you directed*, I shall certainly look to you for their amount," &c. Upon reading this letter, which was admitted to be genuine, Lord *Kenyon* Ch. J. was of opinion, that the action by the present plaintiff could not be supported; for that the legal right to the goods after such delivery was vested in the consignee, to whom alone the carrier was answerable, if at all; and therefore the plaintiff was nonsuited. A new trial, however, was moved for; but after argument the Court determined that the action could only be brought by the consignee, and they refused the rule.

The same question has, indeed, arisen upon bills of lading; and in the case of *Evans v. Martlett*, (n) where it was said, *per totam curiam*, "That if goods by bill of lading are consigned to A., A. is the owner, and must bring the action against the master of the ship if they are lost. But if the bill be special, to be delivered to A. to the use of B., B. ought to bring the action; but if the bill be general to A., and the invoice only shows that they are upon the account of B., A. ought always to bring the action, for the property is in him, and B. has only a trust."

When goods are lost or damaged, the carrier is liable to be sued, either by special action on the case in *tort*, or *assumpsit*; but for a total loss, the carrier is not liable to be charged in *trover*, unless there be a tortious conversion. (o) He is, however, subject to an action of *trover* where he delivers goods to a wrong person, though it happen by mistake. (p)

5. OF THE CARRIER'S LIEN ON GOODS FOR HIS HIRE.] A carrier may retain the goods for his hire. As in the case of *Skinner v. Upshaw*, (q) where the plaintiff brought an action of *trover* against the defendant, being a common carrier, for goods delivered to him to carry, &c. Upon not guilty pleaded, the defendant gave in evidence, that he offered to deliver the goods to the plaintiff, if he would pay him his hire; but that the plaintiff refused, &c., and therefore he retained them. And it was ruled, by *Holt* Ch. J., that a carrier may retain the goods for his hire; and upon this direction the defendant obtained a verdict. So, by general usage, a common carrier has a lien for his general balance. But such usage cannot be supported by a few recent instances of detention of goods by four or five carriers for their general balance; for such a lien is not founded on any common law right, but only by contract, or general usage: (r) Nor can the carrier's lien in any case affect the right of the consignor to stop the goods in *transitu*. (s)

(n) 1 Ld. Raym. 271. 3 Salk. 290. 12 Mod. 156.

(o) 1 Ventr. 223. 5 Burr. 2827.

(p) *Youl v. Harbottle*, Peake's Cas. N. P. 49.

(q) 2 Ld. Raym. 759.

(r) Vide *Aspinall v. Pickford*, 3 Bos. & Pul. 44. n.a. *Rushforth v. Hadfield*, 6 East Rep. 519. 7 East Rep. 224.

(s) *Oppenheim v. Russell*, 3 Bos. & Pul. 42. *Buller v. Woolcott*, 2 New Rep. C. B. 64.

2. OF CONTRACTS WITH COMMON CARRIERS BY WATER.

Owners and masters of *general ships* (*t*) and vessels carrying goods for hire on the high seas, or in navigable rivers, are considered as common carriers, and answerable against all events, except the acts of God, and of the King's enemies, in the same manner as common carriers by land are responsible for the loss or damage of goods entrusted to their care. (*u*) Thus, in the case of *Mors v. Slue*, (*v*) which was an action against the defendant as master of a ship for the loss of certain goods entrusted to his care for safe delivery; to which he pleaded, that in the night, whilst the ship lay in the river *Thames*, eleven persons came on board on pretence of pressing of seamen for the King's service, and by force seized and took the goods. And it was argued that there was not any negligence imputable to the master. But the Court held, that he was nevertheless liable, and gave judgment against him accordingly.

So, in the case of *Dale v. Hall*, (*w*) which was an action upon the case against a shipmaster or keelman, who carried goods for hire from port to port; the plaintiff did not declare against him as a common carrier upon the customs of the realm, but the declaration was, that the defendant, at the special instance of the plaintiff, undertook to carry certain goods, consisting of knives, and other hardware, safe from such a port to such a port, and that in consideration thereof the plaintiff undertook and promised to pay him so much money; that the goods were delivered to the defendant on board his keel, and that the goods were kept so negligently by him that they were spoiled, to the plaintiff's damage. That upon the general issue, *non assumpsit*, this cause came on to be tried before Justice *Burnett*, and the plaintiff proved, the goods were all in good order and clean when they were delivered on board, and that they were damaged by water and rusted to the amount of 24*l*. This was all the plaintiff's evidence. For the defendant it was insisted at the trial, that as the plaintiff had proved no particular negligence in the defendant; that he might be permitted to give in evidence that he had taken all possible care of the goods; that the rats made a leak in the keel or hoy, whereby the goods were spoiled by the water coming in; that they

(*t*) The term "*general ship*" is used in contradistinction to a *chartered ship*, which is employed under a sealed instrument called a charter-party. See *Abbott*, 101.

(*u*) *Coggs v. Bernard*, 2 *Ld. Raym.* 918. 1 *Ventr.* 238. *Jones's Laws of Bailments*, 106, 7. *Abbott*, 208.

(*v*) *T. Raym.* 220. 1 *Ventr.* 190. 238. *S.C.*

(*w*) 1 *Wils.* 381. See the case of *Lyon*

and another *v. Mells*, 5 *East Rep.* 428., where it was determined, that a carrier by water for hire *impliedly* promises that the vessel shall be tight and fit for the voyage; he is, therefore, answerable for damage arising from *leakage*, though he had given notice, "that he would not be answerable for *any* damage, *unless* occasioned by want of ordinary care in the master or crew of the vessel."

pumped and did all they could to prevent the goods being damaged, which evidence the Judge permitted to be given, and thereupon left it to the jury, who found a verdict for the defendant. But upon a rule to show cause why there should not be a new trial, the Court granted the rule, and *Lee* Ch. J. said, "I am of opinion that the evidence given for the defendant was not admissible. The declaration is, that the defendant undertook for hire to carry and deliver the goods safe; and the breach assigned is, that they were damaged by negligence: this is no more than what the law says; every thing is a negligence in a carrier or hoyman that the law does not excuse, and he is answerable for goods the instant he receives them into his custody, and in all events, except they happen to be damaged by the act of *God*, or the King's enemies; and a promise to carry safely, is a promise to keep safely."

So, in the case of *Smith v. Shepherd*, (x) which was an action brought against the defendant as master of a vessel navigating the river *Ouse* and *Humber* from *Selby* to *Hull*, by the plaintiff whose goods had been wet and spoiled; at the trial whereof it appeared in evidence, that at the entrance of the harbour at *Hull* there was a bank, on which vessels used to lie in safety, but of which a part had been swept away by a great flood some short time before the misfortune in question, so that it had become perfectly steep instead of shelving towards the river; that a few days after this flood a vessel sunk by getting on this bank, and her mast, which was carried away, was suffered to float in the river tied to some part of the vessel: and that the defendant upon sailing into the harbour struck against the mast, which, not giving way, forced the defendant's vessel towards the bank, where she struck, and would have remained safe had the bank been in its former situation, but on the tide ebbing her stern sunk into the water, and the goods were spoiled: upon which the defendant tendered evidence to show that there had been no actual negligence: Mr. Justice *Heath*, before whom the cause was tried, rejected the evidence; and he further ruled that the act of *God*, which could excuse the defendant must be immediate; but that this was too remote; and directed the jury to find their verdict for the plaintiff; and they accordingly did so. The case was afterwards submitted to the consideration of the Court of King's Bench, who approved of the direction given by the learned Judge at the trial, and the plaintiff succeeded in the cause. There does not appear to have existed in this case any bill of lading, or other instrument of contract; and the question therefore depended upon general principles, and not upon the meaning of any particular words or exception.

The contract for the conveyance of merchandize in a general ship is that by which the master and owners of a ship, destined on a particular

(x) At the Lent Assizes for *Yorkshire*, 1795. *Abbott on Shipping*, 232.

Upon the general exception of *perils of the sea*, it was determined in the case of *Pickering v. Barclay*, (a) where the ship had been overpowered and plundered on the high seas by pirates, that the owners were not answerable for the loss of goods under such circum-

(u) 2 Rol. Abr. 248. pl. 10. Sty. 132.

stances, because it is said that the taking by pirates was accounted a peril of the sea.

So, in the case of *Bever v. Tomlinson*, (b) which came before the Court of *King's Bench*, a short time before the late alteration of the bill of lading, and which was an action brought to recover the value of goods, for which the master had signed a bill of lading containing an exception only of the perils of the sea, although made during the time of a war, and which goods were lost in consequence of the ship being designedly struck by the vessel of an enemy; it was doubted by the Court, whether a loss so occasioned, were within the meaning of this exception; and it is said that the cause never proceeded to a final judgment.

So, in the case of *Buller v. Fisher*, (c) where it appeared that the ship in which the goods were conveyed, was run down in day-light, and not in a tempest, by one of two other ships that were sailing in an opposite direction to her, both of which kept to windward, as did also the defendant's ship; but it was matter of so much doubt whether the master of the defendant's ship ought to have understood the course which the others would pursue, and have borne to leeward to avoid them, that no blame was considered to be imputable to him for not having done so, nor was any fault attributable to the persons, who had the conduct of either of the other ships. This loss was therefore held to fall within the meaning of this exception, and to have happened by a peril of the sea.

But in the case of robbery, leakage, fire, or where the ship was accidentally driven against a bank at the entrance of a harbour, the courts, we have already seen, (d) have determined that these accidents do not fall within the terms of the general exception. So, it is said, (e) that not every loss proceeding directly from natural causes, is to be considered as happening by a peril of the sea. If a ship perish in consequence of striking against a rock or shallow, the circumstances, under which the event takes place, must be ascertained in order to decide, whether it happen by a peril of the sea or by the fault of the master; if the situation of the rock or shallow is generally known, and the ship not forced upon it by adverse winds or tempest, the loss is to be imputed to the fault of the master. On the other hand, if a ship is forced upon such a rock or shallow by adverse winds or tempest, or if the shallow was occasioned by a sudden and recent collection of sand in a place, where ships could before sail in safety; the loss is to be attributed to the act of God or the perils of the sea.

In the case of *Edwards and others v. Sherratt*, (f) where the defendant, a common carrier from *Birmingham* through *Wolverhampton* to

(b) East. Term, 36 Geo. 3. Abbott 237.

(d) Ante, 586.

(c) Sittings at Guildhall after Mich. Term, 40 Geo. 3. Abbott, 236, 238.

(e) Abbott, 259.

(f) 1 East Rep. 604.

Radford, employed distinct boats to carry to and from *Birmingham* to *Wolverhampton* which passed on different days. The plaintiff knowing this, and having corn at *Wolverhampton* which was threatened to be seized by a mob, wrote to the defendant at *Birmingham* to send a private boat quickly on account of the state of the country, to take the corn to *Birmingham*, to which the defendant not returning any answer, and plaintiff fearing to wait till the day the defendant's boat would, in the usual course of employment, go from *Wolverhampton* to *Birmingham*, stopped the boat passing by from *Radford* to *Birmingham*, and without disclosing the circumstances to the boatman, prevailed on him to take the corn on board, and then despatched him forward in the night, having privately sent orders to open the lock at any time when he should pass. After a verdict for the defendant, negating that the corn was delivered in the usual course of dealing as a common carrier, the Court held that the verdict might be sustained, either on the general ground of fraud in the plaintiff, or on the circumstances of the case, furnishing altogether evidence of a tacit stipulation on the part of the defendant to do the best he could, *but not be answerable as a common carrier for the violence of the mob*; or because it did not appear that the boatman, whose ordinary employment was between *Radford* and *Birmingham* had authority from the defendant to accept the goods at *Wolverhampton* for *Birmingham*, much less to accept them in that manner.

If a common carrier from A. to C. receives goods for delivery at B. an intermediate place, at which he safely arrives, and has an opportunity of delivering the goods, but omits so to do; and the vessel and goods in their passage to C. are unavoidably lost, he is answerable for the value of the goods, though he accepts them under a particular notice, which limits his responsibility to the want of ordinary care. (g)

As soon as the master accepts the goods on board his ship, his and the owner's responsibility commence. But the manner of delivering the goods, and consequently the period at which the responsibility of the master and owners will cease, will depend upon the custom of particular places, and the usage of particular trades. (h) Thus, a hoyman who brings goods from an out-port to the port of *London*, is not discharged by landing them at the usual wharf, but is bound to take care and send them out by land to the place of consignment. And if the consignee require to have the goods delivered to himself, and direct the master not to land them on a wharf at *London*, the master must obey the request; for the wharfinger has no legal right to insist upon the goods being landed at his wharf, although the vessel be moored against it. But in the case of ships coming from a foreign country, delivery at

(g) *Ellis v. Turner*, 8 Term Rep. 531.(h) *Abbott*, 229.

a wharf in *London* discharges the master; if the consignee send a lighter to fetch the goods, the master of the ship is obliged by the custom of the *River Thames* to watch them in the lighter, until the lighter is fully laden, and until the regular time of its departure from the ship is arrived; and he cannot discharge himself from this obligation by declaring to the lighterman that he has not hands to guard the lighter, unless the consignee consent to release him from the performance of it. In the case of ships coming from *Turkey*, and obliged to perform quarantine before their entry into the port of *London*, it is usual for the consignee to send down persons at his own expence, to pack and take care of the goods; and therefore where a consignee had omitted to do so, and goods were damaged by being sent loose to shore; it was held, that he had no right to call upon the master of the ship for a compensation. (i)

A common carrier is not responsible where the servant of the consignee or owner is sent with the goods for the purpose of protecting them. (k)

And in the case of fire, the owners are wholly exempt by statute 26 Geo. 3. c. 86. s. 2. from making good any loss or damage happening to goods by reason thereof; and in other cases of loss the legislature have limited their responsibility. And by the third section of the act it is enacted, "That no master, owner, or owners of any ship or vessel shall be subject or liable to answer for or make good, to any one or more person or persons, any loss or damage, which may happen to any gold, silver, diamonds, watches, jewels, or precious stones, which, from and after the passing of this act, shall be shipped, taken in, or put on board any such ship or vessel, by reason or means of any robbery, embezzlement, making away with, or secreting thereof, unless the owner or shipper thereof shall, at the time of shipping the same, insert in his bill of lading, or otherwise declare, in writing, to the master, owner or owners of such ship or vessel, the true nature, quality, and value of such gold, silver, diamonds, watches, jewels, or precious stones."

By the stat. 7 Geo. 2. c. 15. it is enacted, "That no person or persons who is, are, or shall be owner or owners of any ships or vessels shall be subject or liable to answer for, or make good to any one or more person or persons, any loss or damage by reason of any embezzlement, secreting, or making away with by the master or mariners, or any of them, of any gold, silver, diamonds, jewels, precious stones, or other goods or merchandize, which shall be shipped, taken in, or put on board any ship or vessel, or for any act, matter, or thing, damage or forfeiture, done, occasioned, or incurred by the said master or mariners, or any of them, without the privity and knowledge of such owner or owners, further

(i) *Abbott*, 230.

(k) *East India Company v. Pullen*, 2 *Stra.* 690.

than the value of the ship or vessel, with all her appurtenances, and the full amount of the freight due, or to grow due, for and during the voyage wherein such embezzlement, &c. shall be committed.

And the pilotage act 52 Geo. 3. c. 39. contains a further exception to the liability of ship-owners, by relieving them from any responsibility for any loss or damage occasioned by the neglect or incapacity of any pilot, who may be taken on board in pursuance of the provisions of that act. And the last act 53 Geo. 3. c. 159. which was passed to amend the two first acts, enact in substance first, that owners and part owners of ships shall not be liable to make good any loss or damage to any goods or merchandize, laden on board their ships, beyond the value of the vessel and freight, provided such damage should be occasioned without their fault or privity. The object of this first clause was to give a protection to part-owners as well as to owners. The term part-owners is omitted in the preceding statutes, and introduced for the first time in the present, and it seems to have been the object of the legislature, by the first clause to explain the words, "owner or owners" used in the two previous acts, and to give a protection to part-owners, which might not *perhaps* have been extended to them under the general words, *owner* or *owners* in the 7 Geo. 2. and 26 Geo. 3. Secondly, by the next section there is a legislative exposition of what is to be considered as freight, which the previous statutes had left in general and loose terms. The value of the carriage of goods and merchandize, though *belonging to owners and part-owners*, is to be considered within the meaning of the term freight; and also the hire of the vessel due, or to grow due by virtue of any contract, whether on behalf of his majesty, or of any person or persons or any body politic or corporate. Thirdly, the act then provides for separate losses; but declares that nothing therein contained shall be taken to diminish the responsibility to which any master or mariner may be owner or part-owner. Fourthly, the act next proceeds to except the owners of lighters, barges, boats, &c., employed in inland navigation, and ships and vessels not duly registered. Such are the principal clauses of this act; the remaining sections of which relate to proceedings against owners and part-owners in courts of equity. (k) In a very late case upon this statute, it has been determined by the court of King's Bench that the meaning of the 1st and 4th sections, taken conjunctively, was; 1. That in an action against several joint defendants, as ship owners, for damages sustained by the loss of goods laden on board their ships, they were not liable in that character beyond the value of the ships and freight due, and to grow due; although the loss were occasioned by the misconduct of one of the defendants, who was both master and part-owner. 2. That the value

(k) 2 Holt on Shipping, 109. 1st. ed.

of the ship was to be calculated at the time of the loss, and not at the time of the commencement of the voyage. 3. That in calculating the value of freight due, or, to grow due, the money actually paid in advance was to be included. (l)

3. OF CONTRACTS WITH WHARFINGERS TO SHIP GOODS, &c.

Where goods are sent on the coasting trade, and the usage is to deliver them on the wharf to the mate of the ship by which they are to be carried; if they are delivered to the mate, the wharfinger's responsibility is at an end, and he is not liable, though the goods are lost from the wharf before they are shipped. Thus, in the case of *Cobban* and another v. *Downe*, (m) which was an action brought against the defendant, who was a wharfinger, to recover the value of a parcel of goods which had been sent to the defendant's wharf to be forwarded to *Inverness*, in *Scotland*. The plaintiff proved the sending of four trusses to the wharf; one of which was lost. They were directed to be sent by the ship *George*, bound for that port. The defendant proved, that the goods were brought to the wharf, and laid at the door of the counting-house; that while they lay there, the mate of the *George* was called; that he came; and the truss in question was delivered to him; but what became of it afterwards did not appear. It was contended, on the part of the defendant, that it was no part of the duty of a wharfinger, where goods are to go coastwise, either according to general usage, or the particular usage of the defendant's wharf, to see the goods actually put on board: that they were, in many instances delivered from the warehouse, or from the wharf to the mate of the vessel, to be by him and his crew put on board the vessel; and that on the delivery to them, all further responsibility on the part of the wharfinger was at an end. And several wharfingers were called, who proved the invariable usage to be so: that goods, which were not to go coastwise, were delivered from the carts on board the ship: that when goods came to the wharf, and no ship was then at the wharf bound for the port to which the goods were directed, they were warehoused; and on the arrival of the first ship, they were delivered to the mate of the vessel: but when a vessel was there, they were immediately delivered to him to be put on board; that before the shipping of foreign goods, the wharfinger charged for wharfage and shipping; but for shipping goods coastwise they charged for wharfage only, considering that they had nothing to do with the shipping, being satisfied with a delivery to the mate, or other officer on board the ship, as putting an end to their responsibility. Lord *Ellenborough* Ch. J. said "This is an action charging the defendant in his character of a wharfinger. What the

(l) *Wilson v. Dickson*, 2 Barn. & Ald. 2.. (m) 5 Esp. Rep. 41.

duty of a wharfinger is, is to be measured by the usage and practice of others in similar situations, or his known and professed liability. Every man contracts with the public according to the known and ascertained extent of the trade or business in which he is engaged. The defendant has proved that, by established usage, the goods are delivered by the wharfinger to the mate and crew of the vessel which is to carry them; from which time it has been considered that their responsibility is at an end. Undoubtedly where the responsibility of the ship begins, that of the wharfinger ends; and a delivery to the ship creates a liability there: but the delivery must be to an officer or person accredited on board the ship; it cannot be delivered to the crew at random: but the mate is such a recognized officer on board the ship, that delivery to him is a good delivery, and the responsibility of the ship attaches, if the jury believe that the mate received the goods, as stated by the defendant's witnesses. It has been said, that they were lost on the wharf before they were put on board; but if they were once well delivered to the mate, the subsequent loss cannot affect the wharfinger: they are delivered into the care of the mate; and his negligence cannot revive any responsibility on the part of the wharfinger. I think therefore the usage has been sufficiently proved; that by a delivery to the mate of the ship the wharfinger's responsibility was at an end; and that the only question for the jury to decide was, was the delivery made of the goods to the mate of the *George*, by which vessel the goods were ordered to be sent?" The jury under this direction found a verdict for the defendant.

3. OF CONTRACTS WITH WAREHOUSEMEN.]—A warehouseman is bound only to take reasonable and ordinary care of goods deposited in his warehouse. Thus, in the case of *Cailiff* and another v. *Danvers*, (n) which was an action of *assumpsit* against the defendant as a warehouseman for negligently keeping a quantity of *Ginseng*, which had been deposited by the plaintiff in his warehouse; whereby it had been destroyed and spoiled. It appeared that the box containing the *Ginseng* had been opened, by the plaintiff's directions, for the purpose of showing it to persons who were about to purchase it; that several persons looked at it on different days, and every night the lid of the box was shut down, but not nailed. That many cats were kept in the warehouse, and all possible care taken to destroy vermin; notwithstanding which the rats had got at the *Ginseng*, and destroyed it. Lord *Kenyon* Ch. J. said: "That a warehouseman was only obliged to exert reasonable diligence in taking care of the things deposited in his warehouse; that he was not, like a carrier to be considered as an insurer, and liable for all losses happening otherwise than by the act of

(n) Peake's Cas. N.P. 114.

God, or the King's enemies; and that the defendant, in the present case, having exerted all due and common diligence for the preservation of the commodity, was not liable to any action for this damage which he could not prevent." The plaintiff was therefore nonsuited.

A warehouseman, however, is liable for goods lost or injured, from the time the crane is applied to raise them into the warehouse; and it is no defence that they were injured by falling into the street from the breaking of the tackle, the carman who brought the goods having refused the offer of slings for further security. Thus, in the case of *Thomas and others v. Day*, (o) the declaration stated, that in consideration that the plaintiff had sent and delivered six packs of linen to be housed, lodged and warehoused, in a certain warehouse of the defendant, the defendant undertook safely and securely to take care of, lodge and warehouse them: the breach assigned was, that he did not safely and securely lodge, house, and warehouse them; that two packs of linen were damaged and spoiled by being left in the open street, after falling on the pavement, and thereby wetted and spoiled. The facts proved were, that the plaintiffs were shipping-brokers; the defendant was a warehouseman; that on the 2d July they had sent the six packs of linen in question to the defendant's warehouse: that the person sent saw the defendant's clerk, who gave him the tackle which he applied to the packages; and removed five into the warehouse; and the sixth was left in the crane when he went away, the defendant's servant having paid the carriage. Another witness then proved, that in a short time after, going by, he found one of the packs in the street which was drenched in water, and seventy-nine pieces of linen spoiled. The defendant denied that he was liable to make good the damages, on the ground that the accident had happened from the cords of the packs breaking, his servant having offered to give slings to the carman to make them more secure; which had been refused: that it was the duty of the person sending the goods to see that they were well-corded and secured, so that if any accident happened from their breaking, the warehouseman was not liable. These facts he proposed to prove, and in addition thereto, that warehousemen did not consider themselves as liable by usage, under the circumstances above stated. But Lord *Ellenborough* Ch. J. said: "The whole question turned upon the single point of, when the warehouseman's liability commenced, and the agency of the carman ended? For until the goods were delivered to the warehouseman, the carman was to be considered as the agent of the person sending them; but when the warehouseman took them into his own hands, the moment the warehouseman applied his tackle to them, from that moment his liability

(o) 4 Esp. Rep. 262.

commenced. It has been urged, that the defendant's servants offered him the use of slings. These are provided by the defendant; and he is bound to see that they are of sufficient strength and fit for the purpose; and he should not apply his tackle unless that could be performed which he was bound to do. If the slings were necessary, the refusal of the carman, or his declining the use of them, will not exempt the warehouseman; he ought to have insisted on the carman's using them; and if he refused, he should have repudiated those goods and refused to accept them. It appears here, that the damaged pack of linen was in the crane, and lifted from the cart, it was then in his possession; and being so, I think, in point of law, he is liable for the loss." The jury accordingly found a verdict for the plaintiff.

CHAPTER VI.

OF HUSBAND AND WIFE: AND OF CONTRACTS MADE BY THE WIFE BEFORE AND AFTER MARRIAGE; AND OF THEIR RESPECTIVE LIABILITIES: AND ALSO OF CONTRACTS MADE WITH PERSONS LIVING TOGETHER AS MAN AND WIFE.

BY the law of *England*, when a man and woman marry, all the personal property of the wife passes to the husband, together with the right of enforcing any contracts which may have been made with her, and suing for all debts owing to her prior to the marriage; and as the law vests all her property in him, so it equally casts upon him all liabilities, in respect of contracts made, or debts contracted by her whilst she was unmarried. So, he is bound by any contracts made by her with his consent and authority during marriage. And, as a general rule, he is also bound by her contracts for necessities supplied for her necessary support and maintenance. I propose to consider the subject of the present chapter, in the following order, viz.

1. OF CONTRACTS MADE, AND DEBTS INCURRED BY THE WIFE BEFORE MARRIAGE.
2. OF CONTRACTS MADE BY THE WIFE DURING MARRIAGE, WITH THE AUTHORITY OF HER HUSBAND AS HIS AGENT: AND OF CONTRACTS MADE BY A FEME COVERT, SOLE TRADER, &c.
3. OF CONTRACTS MADE BY THE WIFE DURING THE EXILE OR BANISHMENT OF HER HUSBAND.
4. OF CONTRACTS FOR NECESSARIES FURNISHED THE WIFE DURING THEIR COVERTURE.

5. OF CONTRACTS MADE BY A WOMAN LIVING WITH A MAN AS HIS WIFE.

6. HOW HUSBAND AND WIFE MUST SUE AND BE SUED.

I. OF CONTRACTS MADE, AND DEBTS INCURRED BY THE WIFE BEFORE MARRIAGE.

All the personal estate, as money, goods, cattle, household furniture, &c., that were the property, and in the possession of the wife at the time of the marriage is, by law, vested in the husband; and he alone has the power of disposing of the whole or any part of it without her consent; and whatever part remains undisposed of at his death, shall go to his executors or administrators and not to the wife, though she survive him. (a) But *choses* in action, as debts due to the wife, which are to be demanded by action, though they are likewise so far vested in the husband, that he may reduce them into possession; yet if he dies before any alteration made by him, they shall go to his wife, nor shall they, without such alteration, survive to the husband upon the death of the wife, or he have any right to them, but as he may be entitled, as administrator to his wife. (b) The husband is also entitled to whatever his wife earns during coverture. (c) Therefore, a note payable to a *feme sole*, or order, who afterwards marries, becomes the property of her husband, and she cannot legally indorse it over to a stranger during coverture. (d) But where an estate is vested in trustees for the separate use of the wife, the husband cannot maintain any action at law against a stranger for wrongfully receiving the rents and profits thereof. (e)

With regard to debts contracted by the wife before marriage, the law has provided, that if a man marries a woman who is in debt to divers persons, the husband and wife, during coverture, shall be sued for the recovery of them; but if the wife die, and the creditors have neglected to recover their debts, the husband shall not be charged therewith after the death of his wife; for the debts must be recovered in the life-time of the wife: (f) and if the wife survives her husband, she alone is liable, and not his representatives. (g)

(a) Bac. Abr. tit. Baron and Feme, C. 3. (c) *Davison v. Atkison*, 5 Term. Rep. 434.

(b) *Ibid.* See also Co. Lit. 351. a. b. n. 1. 3 Mod. 186.

(c) Bul. Ni. Pri. 136.

(d) 3 Wils. 5. Stra. 516. 10 Mod. 246.

(f) F. N. B. 120. F. Bac. Abr. tit. Baron and Feme, F. Com. Dig. tit. Baron and Feme, N. and 2 C.

(g) 1 Campb. Rep. 189.

2. OF CONTRACTS MADE BY THE WIFE AFTER MARRIAGE,
WITH THE AUTHORITY OF HER HUSBAND AS HIS AGENT :
AND OF CONTRACTS MADE BY A FEME COVERT AS A SOLE
TRADER.

A married woman has no power to make a contract without the authority or assent of her husband, precedent or subsequent, express or implied; therefore if she enters into any contract without such authority or assent, it is absolutely void. (h) So, if the wife sell or dispose of the goods of her husband, without his assent, the sale is void, and the husband may recover them back by action of trover. (i) So, where the wife buys goods without the consent of her husband, he is not chargeable for them. (k) So, a note or bill drawn, or indorsed by a married woman, is void. (l)

So, where the executor of a *feme covert*, who lived apart from her husband, and traded as a *feme sole*, is not liable to be sued at law for debts contracted by the wife during her coverture, whilst living in a state of separation. (m)

In some modern cases, (n) it was indeed decided, that a married woman living apart from her husband, and having a separate maintenance secured to her by deed, might contract and be sued as a *feme sole*, and that her second husband was liable for debts contracted in the life-time of her former husband, during the state of separation. But in a subsequent case of *Marshall v. Rutton*, (o) these decisions were reviewed and fully considered; and after several arguments at the bar, it was solemnly determined by all the judges, that a *feme covert* cannot contract and be sued as a *feme sole*, even though she be living apart from her husband, having a separate maintenance secured to her by deed.

But a contract made by a married woman with the assent of her husband, is good; and shall be taken as the contract of the husband. (p) So, where a wife traded by her husband's consent, and gave bills for money, and he received the profits. The wife borrowed 100*l.* and died, and a bill was brought against the husband for the money. An issue was directed to try, whether the money was borrowed for carrying on the trade; for if it were, the husband should be decreed to pay it. (q) So, if the wife of A. receives 10*l.* to the use of B., and this comes to the profit of A. in a convenient and necessary way, though it was without A.'s order or consent after, yet A. is liable to this debt, and the count

(h) Ruled by all the judges in the case of *Manby v. Scott*, 1 Sid. 120. 1 Lev. 4. 1 Mod. 128. (n) Vide *Corbett v. Poelnitz*, 1 Term Rep. 5.

(i) Com. Dig. tit. Baron and Feme.

(k) 4 Leon. 42.

(l) 3 Wils. 5. See also 1 Stra. 516. 1 East, Rep. 432. 3 Esp. Rep. 266.

(m) *Clayton v. Adams*, 6 Term Rep. 604.

(o) 8 Term Rep. 545. See also *Hatchet v. Baddeley*, 2 Bl. Rep. 1079.

(p) 4 Vin. Abr. tit. Baron and Feme. E. a. pl. 20. 3 Bulst. 90. 1 Stra. 80.

(q) 2 Freeman's Rep. 215. pl. 288.

or declaration shall be of a receipt by the hands of the baron. (r) Again, if a *feme covert*, without any express authority from her husband, contract with a servant by deed, the servant, having performed the service stipulated, may maintain *assumpsit* against the husband. (s) So, where a husband permits his wife to act for him in any department or business, her contracts and acknowledgments shall bind the husband. (t)

OF CONTRACTS MADE WITH A FEME COVERT SOLE TRADER.] — By the custom of *London* if a *feme covert* exercises a trade in which her husband does not at all concern himself, she may be sued as a *feme sole*, in the *city courts*, for debts contracted by her in the carrying on of that trade; and if she has not goods that are not her husband's, she must be imprisoned till she satisfies her creditors; and as she may be sued, so she may sue as a *feme sole* for debts owing to her, in the way of her trade, within the city. (u) But a *feme covert* sole trader cannot sue or be sued as a *feme sole*, even upon the custom of *London*, in the superior courts at *Westminster*; but her husband must be joined for conformity. (v)

3. OF CONTRACTS MADE WITH THE WIFE DURING THE EXILE OR BANISHMENT, &C. OF HER HUSBAND.

We have already seen that the contracts of a *feme covert* are in general void, unless made with the assent of the husband. But in the case of banishment, abjuration, or exile, the law considers the husband as civilly dead, and therefore permits the wife to contract, and sue or be sued as a *feme sole*; for it would be unreasonable that she should be remediless on her part, and equally hard upon her creditors, who not having any remedy against the husband, should be without remedy against the wife. (w) And an action lies against a *feme covert*, though the banishment be only for a limited time: this was determined in the case of *Sparrow v. Carruthers*, (x) which was an action upon a note of 10*l.* given by a married woman, who kept a public-house, for some malt. The defence relied on was the defendant's coverture. But, upon the trial, the plaintiff proved that her husband had been transported, and his time was not expired. The question was, whether she was liable. *Yates Just.* thought that the Court must consider the transportation as suspending her disability. A verdict was accordingly found for the plaintiff.

(r) *Jenk.* 4. pl. 5.

(s) *White v. Cuyler*, 6 *Term Rep.* 176.

(t) *Emerson v. Blonden*, 1 *Esp. Rep.* 142.

(u) 10 *Mod.* 6.

(v) *Candell v. Shaw*, 4 *Term Rep.* 361. *Beard and Wife v. Webb*, 2 *Bos. and Pul.* 95.

(w) *Bro. Abr. tit. Baron et Feme*, pl. 66. *Lady Belknap's case*, 1 *H. 4.* 1. p. 12. 2 *H. 4. f. 7. a.* *Co. Lit.* 132. b. 133. a. 1 *Rol. Rep.* 400. *Mo.* 85. 1 *Bulst.* 140. 3 *Bulst.* 188. *Bac. Abr. tit. Baron & Feme, M.*

(x) *Coram Yates Just.* on the Northern Circuit, cited in 1 *Term Rep.* 6.

The principle of this rule of law has also been extended to cases where the husband has resided abroad, without any probability of returning to *England*, and where the wife has represented herself, and contracted as a *feme sole*. Thus, in the case of *Derry v. The Dutchess of Mazarine*, (y) which was an action of *assumpsit*, brought against the defendant, for wages and money lent ; the defendant pleaded coverture, and issue thereupon. And notwithstanding there was very strong evidence at the trial, that the Duke of *Mazarine*, the defendant's husband, was alive in *France*, the jury found for the plaintiff ; because the Dutchess had lived in *England* for 20 years as a *feme sole*, and had contracted continually as such ; and he, who was her husband, was an *alien enemy*. It was moved, on behalf of the Dutchess, that this verdict was against evidence and law, for a *feme covert* cannot be solely charged for debts and contracts, without divorce and alimony, although the husband be a foreigner. But by *Holt Ch. J.* when the husband is an alien enemy, and under an absolute disability to come and live here, the law perhaps will make the wife of such an husband chargeable as a *feme sole* for her debts and contracts.

So, in *Walford v. The Duchess De Pienne*, (z) which was an action of *assumpsit* for goods sold and delivered. Plea of coverture. The evidence in support of this plea established the fact of marriage ; and further that the Duke, who was a foreigner, had gone abroad in the year 1793, and had not since returned ; during that interval the Dutchess had kept house, and paid bills for goods furnished on her own account, and in her own name ; but the witness who proved those facts said, that the Duke, on his going abroad, had proposed to remain abroad only for four months, and as the witness believed, had not abandoned his intention of returning to this country, though he had not yet done so. Lord *Kenyon Ch. J.* ruled, that the defendant was liable. His lordship said, " The present case came within the principle of the old common law, where the husband had abjured the realm. If the husband had been absent for some time, and then returned and paid bills contracted by the wife in his absence, and again left the kingdom, he should hold the wife not liable ; but here was a desertion of the kingdom, and an absence of some years ; (a) he was no longer domiciled here, and in the interval his wife was supplied with those articles ; if she was not to be held liable for debts contracted under such circumstances, she might be starved."

So, in *De Gaillon v. L'Aigle*, (b) which was an action of *indebitatus assumpsit* for money paid, &c. The defendant pleaded coverture with

(y) 1 *Ld. Raym.* 147. But see 2 *Salk.* 646. 2 *Wils.* 308.; and 1 *Bos. & Pul.* 339.

(z) 2 *Esp. Rep.* 554. 587.

(a) About three years.

(b) 1 *Bos. & Pul.* 337.

John Martin Harel L'Aigle. The plaintiff replied, that before the making of the promises and undertakings in the said declaration mentioned, and from thence hitherto, the said *John Martin Harel L'Aigle* lived and resided in parts beyond the seas, out of this kingdom, to wit, at *Hamburgh*; and that during all that time the said *Victoire Harel L'Aigle* lived in this kingdom separate and apart from the said *John Martin Harel L'Aigle*, and followed and carried on the trade and business of a merchant, as a single woman, and a sole trader, to wit, at *Westminster*, &c.; that the plaintiff did not give any credit to the said *John Martin Harel L'Aigle*, but traded and dealt with the said *Victoire Harel* as a *feme sole*, and on her sole credit; and that the said *Victoire Harel* made the said several promises and undertakings in the said declaration mentioned, as such *feme sole* as aforesaid.

To this there was a general *demurrer* and joinder. But the Court held, that the defendant was personally liable, and accordingly gave judgment for the plaintiff. And *Buller* Just. said, "There is another set of cases of a very different nature from those which have been relied on by the defendant; but which are much more applicable to this case. The first of these is the *Lady Belknap's* case: (c) now let us see if any sound distinction between that case and this can be maintained. The husband there was banished, but it is not stated whether he was banished for one year, or five years, or for life: it was held sufficient that he was in banishment at the time when *Lady Belknap's* contract was made; and I can see but one principle on which the case could have been decided; viz. that the rights known to exist in law between husband and wife were not interfered with by allowing the wife to be taken in execution; as the husband was banished (though it be not stated whether for life or not,) the matrimonial rights during his banishment were at least suspended. In later times the cases have gone further. In *Sparrow v. Carruthers*, (d) it was shown, in answer to evidence of coverture, that the husband was transported for seven years only, and after that time was expired, he had a right to return, and demand the comfort of his wife, even if she were in gaol; yet the husband being abroad, and not capable of enjoying the matrimonial rights, it was held that the disability of the wife was suspended. In those cases the husband was sent out of the country for his crimes, whereas here the husband has voluntarily abandoned his wife, and, for any thing that appears, never was in *England*, and perhaps never may come here. The wife has traded as a *feme sole*, has obtained credit as such, and ought to be liable for her debts." And *Heath* Just. said, "I am of the same opinion. The cases of banishment and transportation of the husband are directly

(c) *Ante*, 599. n. w.

(d) *Ibid.* 599.

in point. Besides, it is for the benefit of the *feme covert* that he should be liable to an action in such a case as this, otherwise she could obtain no credit, and would have no means of gaining her livelihood. The husband, perhaps, never was in *England*, and never may be, so that this case is not at all like those which proceeded on the ground of a separate maintenance."

But where the husband's absence is merely temporary, the wife cannot be sued as a single woman. Thus, in the case of *Farrer v. The Countess Dowager of Granard*, (e) which was an action of *indebitatus assumpsit* for the use and occupation of certain ready furnished lodgings. The defendant pleaded coverture; to which the plaintiff replied, that the defendant's husband lived and resided in *Ireland*, and that the defendant lived in *England*, as a single woman, and as such single woman, promised, &c. The Court held the replication bad on general demurrer; the terms of it only amounting to a mere temporary absence.

4. OF CONTRACTS FOR NECESSARIES FURNISHED THE WIFE DURING MARRIAGE.

The husband is not only liable to the debts of his wife before marriage, but is also obliged to maintain his wife after marriage; and find her with necessaries, as meat, drink, clothes, &c. suitable to his estate and condition in life. And though in general the wife has no power to bind her husband by any contract of hers, without his assent *express* or *implied*, yet it is settled, that whilst she cohabits with her husband, he shall be chargeable for all contracts made by her for necessaries; and his assent thereto shall be presumed on account of the cohabitation, unless the contrary appear. Such contracts, however, are considered in law as the contracts of the husband, and he alone is chargeable. (g) So, where the husband leaves his wife, or refuses to permit her to live with him; or if he treat her so ill as to oblige her to depart from his dwelling; in either of these cases the law makes the husband liable to her contracts for necessaries. This was settled in the case of *Bolton v. Prentice*, (h) which was an action of *assumpsit* for goods sold and delivered to the defendant's wife; the case appeared to be that the defendant and his wife had formerly lodged at the plaintiff's house, and the plaintiff furnished her with goods; and the defendant finding the plaintiff had helped her to pawn her watch, and suspecting he con-

(e) 1 New Rep. C. B. 80. See also Dig. tit. Baron and Feme. Q. Bac. Abr. 3 Esp. Rep. 18.

(g) Vide *Manby v. Scot*, 1 Sid. 128. 9. 1 Lev. 4. 1 Mod. 128. 1 Salk. 118. Com.

(h) 2 Stra. 1214.

federated with her, left the lodgings, after paying the plaintiff his bill, and forbidding him ever trusting her again. After this, the defendant and his wife cohabited together for a year, when, without any cause appearing, he left her, locked up her clothes, and, upon her finding him out, refused to admit her, and struck her, and declared he would not maintain her, or pay any body that did. In this distress she borrowed clothes of her friends, and applied to the plaintiff, who furnished her with necessaries according to the defendant's degree; which the defendant refusing to pay for, this action was brought, and upon trial, the jury found for the plaintiff. And upon motion for a new trial, the Court held, that the verdict was right; for whilst they were at the plaintiff's, there was a particular reason for the particular prohibition; yet the causeless turning her away destitute afterwards, gave her the general credit again; and if a husband should be allowed, under the notion of a particular prohibition, to destroy her obtaining credit in one place, he may, in the same manner, prevent it with all people she is acquainted with. He appears to be a wrong doer, and therefore has no right to prohibit any body. They distinguished this case from that of *Manby v. Scott*, 1 Sid. 109., for there the wife was guilty of the first wrong in eloping.

So, in the case of *Thompson v. Hervey*, (i) which was an action brought against the defendant for lodging and necessaries for his wife, during her residence at *Bristol*, (which her health absolutely required;) wherein a verdict had been given for the plaintiff, against Mr. *Hervey*. It appeared from Lord *Mansfield's* reports of the evidence, that she had herself paid part of the money, viz. what was due to the plaintiff for the former part of the time; and that she had a pension, during pleasure, from the crown, determinable at the will of the crown, of 300*l.* a year, granted to her in her own name, but not by any agreement or otherwise appropriated at all to her own use; that at her return from *Bristol*, her husband shut his doors against her; that Mr. *Hervey* had never made, or agreed to make, any separate allowance to her, or had contributed any thing towards her support, since he had so shut his doors against her, nor had she any use of his table, servants, or equipage; and there was evidence given of his being reputed to have an income of about 1800*l. per annum*. The Court held, that the husband was liable to this action, and said; "Here is no agreement for a separation; but he has sent her adrift, by shutting his doors against her. He allows her no separate maintenance, nor any support at all. And there is no pretence of this lodging and other support provided for her by the plaintiff, being improper for her degree and condition of life. And as she had no maintenance from her husband, nor admittance into his

(i) 4 Bur. 2177.

house, she was obliged to procure lodging and maintenance somewhere else. Every man is obliged to maintain his wife. The pension is only a voluntary grace and bounty of the crown, and only during the pleasure of the crown; not what any creditor of hers, even for her necessary subsistence suitable to her degree and rank of life, can be supposed to give her credit upon."

So, in the case of *Robison v. Gosnold*, (k) where it appeared that a husband discovering his wife to be a very lewd woman, went away from her; and she, after having lived several years with an adulterer, was received into the plaintiff's house, who entertained her as the husband's wife. And this action being an *indebitatus assumpsit* against the husband; for lodging and dieting the wife, Holt Ch. J., at *nisi prius*, held, that let the woman be ever so vicious, yet, while she will cohabit with the husband, he is bound to provide necessaries for her, and is liable to an action at the suit of those who may furnish her with them; for his bargain was to take her for better for worse. In like manner it is, if the husband turns his wife away for her wickedness, he remains still chargeable for her necessaries. But if the wife leaves her husband; they that trust her after it is notorious that she has left him, do it at their peril, and shall not thereupon charge the husband.

So, in the case of *Harris v. Morris*, (l) which was an action of *assumpsit* brought to recover a sum of money, claimed by the plaintiff for meat, drink, and other necessaries, furnished to the defendant's wife. The plaintiff's counsel stated, that the wife having been turned out of doors by the defendant, had taken shelter with the plaintiff, where she was entertained, and furnished with necessaries. The defendant denied that she was turned out, but relied on her having been seen in improper familiarities with a person living near her house, though he could produce no proof of actual adultery; that she had formerly eloped for adultery, and been in the *Magdalen Asylum*, but that he had afterwards taken her back; that he had advertised her in the newspapers, and cautioned persons from trusting her on his credit; lastly, that he was a journeyman tradesman, and incapable of making her any allowance. In answer to the last matter relied on by the defendant, it was proved, that the defendant had said, that his wife had ten guineas a year, independent of him, and that he could allow her 5*s.* per week addition. This was pressed by the plaintiff's counsel, as having been ruled by Lord Mansfield, to be evidence of the husband's ability to that extent. Lord Kenyon Ch. J. said; "The defendant has urged several matters in bar of this action, but none appear to me to amount to a legal defence. With respect to her having been formerly guilty of adultery, and having been in the *Magdalen Asylum*, though an adul-

(k) 6 Mod. 171. 1 Salk. 119. S. C.

(l) 4 Esp. Rep. 41.

terous elopement will prevent the husband from being liable for articles furnished to the wife during the term of her elopement, that is no answer now. The husband has taken her back, and she was from that time entitled to dower; she was *sponte retracta*, and of course entitled to maintenance during coverture, if her husband turned her out of doors. The next defence is, that he advertised her in the newspaper, and forbid persons to trust her; that cannot avail him; for if he put her out of doors, though he advertised her, and cautioned all persons not to trust her; or if he even gave particular notice to individuals not to give her credit, still he would be liable for necessities furnished to her, for the law has said, that where a man turns his wife out of doors, he sends with her credit for her reasonable expences. With respect to the offer of five shillings *per week*, I agree with what my Lord *Mansfield* has said, "that it is evidence to go to the jury of the husband's liability; but the jury ought to consider the terms upon which it was offered." A juror was withdrawn by consent. So, in the case of *Hodges v. Hodges*, (m) which was an action of *assumpsit* brought by the plaintiff (who was the son of the defendant) to recover a sum of money for the board and lodging of his mother, the defendant's wife. The plaintiff's case was, that the wife had been compelled to leave her husband's house in consequence of gross ill-treatment and cruelty. Evidence was given to this effect, but it appeared, that she had voluntarily left the defendant's house, though it proceeded from apprehensions of his ill-treatment and barbarity. It was contended, for the defendant, that though in case the husband turns the wife out of doors, he sends with her credit for necessities, the rule of law did not apply, where she voluntarily quitted it.

Lord *Kenyon* Ch. J. said, "That where a wife's situation in her husband's house was rendered unsafe from his cruelty or ill-treatment, he should rule it to be equivalent to a turning her out of the house, and that the husband should be liable for necessities furnished to her under those circumstances."

So, in the case of *Ewers v. Hutton*, (n) which was a similar action to the last. And it was proved, that the defendant had treated his wife with much barbarity, and turned her out of doors; that the plaintiff received her into his family, and furnished her with necessities, for which the present action was brought. There was also evidence given, that some time after the wife had been turned out, she returned and rung at the bell; the defendant went down to the door, and refused to admit her. It was also proved, that the wife had had between 300*l.* and 400*l.* fortune when she married. The defence was, that the absence of

(m) 1 Esp. Rep. 441.

(n) 3 Esp. Rep. 255. See also *Shepherd v. Mackoul*, 3 Campb. Rep. 336.

the wife, for part of the time, was an elopement: as she might have returned to her husband's house. 2dly, That a separate maintenance was secured her some time after her leaving her husband's house. To prove which, the defendant gave in evidence a deed of separation executed by the husband and wife; but it was not executed by the wife's trustee, who was a party to it.

Lord *Eldon* Ch. J. said, " There is no doubt of the law, that where a husband, either from ill-treatment, compelled his wife to leave his house, from motives of personal safety, or turned her out of doors, that any person who afforded her protection, and furnished her with necessaries correspondent to his rank and situation in life, could compel the husband to pay for them, but that in ascertaining what suited his circumstances, the fortune which the wife brought could not enter into the consideration; the jury were to regulate their verdict by what the husband's circumstances were when the separation took place. As to the question of elopement, it did not appear clearly, whether the term *elopement* in the books, meant an adulterous elopement or not; here there was no imputation of an adulterous intercourse; and with regard to the deed of separation produced, it was waste paper, it was binding in no degree; it was executed by the husband and wife, but the wife had no will of her own; she could execute no deed; she could not covenant with her husband; she could only contract by the means of a trustee, who became bound for the performance of what she contracted to do; here he had not executed the deed. The husband could not therefore be sued, and the deed was of no avail." His lordship, therefore, concluded with observing, " that the wife having solicited to be received into the defendant's house, and being refused by him, he was bound to provide her with necessaries, and that the deed of separation furnished him with no defence."

But no ill-treatment, short of personal violence, or such as will induce a reasonable fear of it, will justify a third person in providing a maintenance for the wife, so as to entitle him by action at law to recover against the husband. (o) Where a husband goes abroad and leaves his wife, who dies in his absence, a third person, who voluntarily pays the expences of her funeral (suitable to the rank and fortune of the husband) though without the knowledge of the husband, may recover from him the money so laid out, especially if such third person be a relation of the wife. (p)

So an action of *assumpsit* lies against a husband for money lent to his wife upon his *express assent*. But in such action the money must be stated to have been lent to the husband alone. (q)

(o) *Horwood v. Heffer*, 5 Taunt. Rep. 421.
(p) 1 H. Bl. 90.

(q) 3 Wils. 386, 2 Bl. Rep. 872.

In actions for necessities, it should be observed, that in all these cases the things supplied to the wife must be proved to be necessities suitable to the estate and condition of the husband; for if they be not, he will be discharged. And though a husband is bound to provide necessities for his wife as long as she cohabits with him, or whilst he absents himself from her, or she is obliged to live apart from him on account of his ill usage to her, yet if she *voluntarily* departs from his dwelling, and lives apart from him without his consent; or if the husband absolutely declares his dissent that she shall not be trusted; any person having notice of this dissent, trusts her at his peril.

Thus, in the case of *Manby v. Scott*, (r) where the wife of the defendant departed from him without his consent; and during her absence the husband prohibited several persons, and among the rest the plaintiff, from trusting her: and, after an absence of twelve, she made a request to cohabit again with her husband, but he refused to receive her. The plaintiff sold her silk and velvet to the value of 40*l.* which were found suitable to the degree of her husband. It was solemnly determined by eight judges against three, that the husband was not chargeable in this case; for the prohibition, here stated, took away all presumption of any consent of the husband to the contract, either expressed or implied.

So, in the case of *Etherington v. Parrott*, (s) which was an action of *indebitatus assumpsit* for goods sold and delivered. At the trial before Holt Ch. J. at Guildhall, the evidence to charge the defendant was, that the goods were taken up by the defendant's wife to make her clothes, and that they cohabited together: but on the defendant's side it was given in evidence, that his wife was an extravagant woman, and used to pawn her clothes for money to buy drink; that she pawned a suit of clothes, which cost 7*l.* for 1*l.* 8*s.* and when her husband redeemed them, pawned them again; that at the time of buying these, she had very good clothes; that she had bought clothes of the plaintiff before, and her husband had paid for them; but when he paid for them, he gave notice to the plaintiff's servant, who received the money, that his master should trust her no more, which he promised not to do. And by Holt Ch. J. "If a husband turns away his wife, he gives her credit wherever she goes, and must pay for necessities for her; but if she runs away from him, he shall not be liable to any of her contracts, for it is the cohabitation that is an evidence of the husband's assent to contracts made by his wife for necessities. But if the husband has solemnly declared his dissent, that she shall not be trusted, any person that has notice of this dissent, trusts her at his peril after; for the husband is only liable upon account of his own assent to the contracts of his wife, of which assent cohabitation causes a presumption; and when he has declared the contrary, there is

(r) 1 Sid. 109. 1 Lev. 4. 1 Mod. 128. S.C. (s) 2 Ld. Raym. 1006. 1 Salk. 118.

no longer room for such a presumption. For the wife has no power originally to charge her husband, but is absolutely under his power and government ; and must be content with what he provides, and if he does not provide necessaries, her remedy is in the spiritual court. But here were sufficient necessaries provided, and also the husband had forbidden any trusting her, and notice to the defendant's servant usually employed by him in his trade, was a good notice to his master the plaintiff ; and he cannot charge the defendant." Therefore he was nonsuited.

But in the case of *Rawlins v. Vandyke*, (†) which was an action of *assumpsit* for the lodging of the defendant's wife and children ; and for goods sold and delivered to them. The plaintiff proved the lodging of the parties at his house, and the furnishing of linen drapery goods to the wife and children of the defendant ; which appeared to be necessaries for them. The defence was, that the defendant and his wife lived separate ; that he allowed her ten guineas a week ; that the plaintiff had notice of those circumstances, and not to trust her : but the notice not to trust her, was said by the plaintiff to have taken place after the bill for the goods had been delivered. It was further contended, that there was no evidence that the husband had refused to receive her. But it was given in evidence that Mr. *Vandyke*, the defendant, had supported a separate establishment for his wife at *Bath*, where he had visited her once, and at *Osborn's Hotel* in *London* ; and paid the bills at both places. Lord *Eldon* Ch. J. said : " The defendant's counsel relies on his discharge from this action, first, on the ground, of his living apart from his wife ; and there being no evidence that he refused to receive her. My conception of the law is this : that if a man will not receive his wife into his house, he turns her out of doors ; and if he does so, he sends with her credit for her reasonable expences. In this case Mr. *Vandyke* has lived apart from his wife, but he has paid her expences incurred in that situation in other places, and has therefore given her credit. The second ground taken by Mr. *Vandyke's* counsel is, that he gave her a separate maintenance ; informed the tradesman of that fact, and gave him notice not to trust her. Separation, with a separate maintenance, was formerly held sufficient to charge the wife, but it is not so held now ; the wife is not now liable ; but it is a different thing to hold the wife not to be liable, and the husband to be liable. The object of this action is to make the husband liable. If the husband gives express notice to a tradesman not to trust his wife, he shall not be charged for goods furnished to his wife : and if a tradesman has notice of a separate maintenance given to the wife, it is the doctrine of Lord *Holt*, that that shall be notice of an express dissent on the part of the husband, and he shall not be charged ; but where the tradesman's demand is for neces-

(†) 3 Esp. Rep. 250.

saries, it is incumbent on the husband to show that the tradesman knew of the separate maintenance. The question therefore will be, did Mr. *Vandyke* dissent from furnishing his wife with the things charged? I am of opinion, that for every thing furnished after notice of the separate maintenance, that that amounted to a dissent; and for those, that the defendant is not liable. With respect to the things furnished to the children, I do not lay it down as the law, that where the children live away from the father, that he is liable, because the things furnished are necessaries: as a father, he has a right to the custody of his children, and may obtain possession of their persons by *habeas corpus*; but where he does not assert that right, and suffers them to remain with their mother, I think he thereby constitutes her as his agent, and authorizes her to contract those debts for clothing and other necessaries; but this I think should be left to the jury."

Where a married woman elopes from her husband, and afterwards contracts a debt, not only the husband is not liable, but the wife cannot be sued either alone, or jointly with her husband. Thus, in the case of *Hatchett* and another v. *Baddeley*,^(u) which was an action of *assumpsit* against the defendant by the name of *Sophia Baddeley*, (without any addition) for money due to the plaintiffs as coachmakers for work and labour and materials, &c. The defendant pleaded *non assumpsit*, and also that she was married to one *Robert Baddeley*, her husband, who was then alive. The plaintiffs replied, *protestando* as to the marriage, that the defendant, before the cause of action accrued, eloped from the said *Robert Baddeley*, and hath ever since lived separate from him, and that the work was done on her credit only. The defendant not rejoining in due time, judgment was signed against her for want of a rejoinder: but it was afterwards moved in arrest of judgment that the replication was bad on the following grounds; 1st. Supposing the facts to be true, it does not therefore follow that she is liable to be sued alone. 2dly, It should not have been alleged that she *eloped*, but that she lived in *adultery*. So is *Rastell's Entries*, 230. pl. 9. in bar of dower, and *Robins. Entr.* 260. 3dly, It should have stated the cause of action to have been for necessaries. The Court arrested the judgment, and *De Grey Ch. J.* said: "The word *elopement* is not a legal term, nor has any express meaning in the law. It is not to be found in *Bracton*, *Britton*, or *Fleta*; nor is used in the statute of *Westm. 2.* The *Mirror* indeed has the word *elopa*; but in a different sense: and none of the dictionaries or etymologists explain the word, except *Blount* and *Jacob*. *Lord Coke* is the first that I remember to have mentioned it, and he speaks in 2 *Inst.* 435. of a wife's eloping and remaining with an adulterer. The modern books never speak of elopement but in a criminal view.

(u) 2 Bl. Rep. 1079. *Sed vide Cox v. Kitchen*, 1 Bos. & Pul. 338.

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But it is quite indifferent, as to forming my opinion on this case, in what sense the word is to be taken. The present case is not that of a woman having a separate maintenance, and living apart from her husband by his express permission: but of a wife departing from her husband's house, or, if you please, eloping, without his consent. She is in every view, even in respect of dower (unless adultery be proved) a *feme covert*; and as such can neither sue nor be sued alone. This is the general law. The exceptions to this, are, 1st. local customs, as in the city of *London*, where a *feme covert*, being a sole trader, may be sued. But there the husband must be joined in the action at the outset, for conformity. 2dly, The wife of an exile, one abjuring the realm, or perhaps one professed, who are looked upon as dead in law. 3dly, The same law has been extended to cases somewhat like the former, as the *Duchess of Mazarine's* case, whose husband lived in *France*. All these are by the acts of the husband; but no act of the wife can ever make her liable to be sued alone. If she can be sued, she can sue, acquire property, release actions, execute deeds, &c. which would overturn first principles. On the whole, therefore, I am clearly of opinion the defendant is not in a capacity to be sued alone."

So, if husband and wife be separated by mutual consent, and the husband secures to her a separate allowance by deed, and this is generally known in the place where the husband resides, he is not liable for necessities furnished his wife in a strange place where the circumstances of the separation are wholly unknown. Thus, in the case of *Todd v. Stokes*, (v) which was an action brought by the plaintiff, being an apothecary, for medicines found for the defendant's wife. It was proved, that the defendant and his wife had been separated by consent for five years; and that upon the separation the defendant signed articles to certain trustees, by which he obliged himself to allow his wife twenty pounds a year, which he had done accordingly ever after; that the plaintiff, when he furnished the defendant's wife with these medicines, did not know that she was a married woman, &c. And it was ruled by *Holt Ch. J.*, that the defendant was not bound to pay the plaintiff's bill. For though the plaintiff had not personal notice of their separation, and though it was not the general reputation in *London*, where the plaintiff lived, that the defendant and his wife were separated, yet since it was the general reputation in the place where the defendant lived, and that for five years past, it was enough to exempt the defendant's wife from being capable to charge the defendant, though for necessities. But if the wife had come immediately from her husband after the separation, before it could have been publicly and generally known, and had taken up necessities upon credit, the husband would have been liable.

(v) 1 Lord Raym. 444. 12 Mod. 244. S. C. See also 4 Campb. Rep. 70. and 4 Barn. & Ald. 252. S. P.

But if the husband in such case fails to pay the stipulated allowance, he is liable for necessaries furnished his wife. Thus, in the case of *Nurse v. Craig*, (w) which was an action of *indebitatus assumpsit* for meat, drink, washing, lodging, and other necessaries, with counts for money lent and advanced, paid, laid out and expended, had and received, and on account stated. At the trial, before Sir *James Mansfield* Ch. J., it appeared in evidence, that the defendant and his wife, having agreed to separate from each other in the year 1802, a deed of separation was executed in the year 1803, between the defendant, who was a tailor in low circumstances, of the first part, his wife of the second part, and the plaintiff, who was sister to the defendant's wife, of the third part, by which the defendant covenanted with the plaintiff, and agreed with his wife that he would permit his wife to live apart from him, as a single woman, and would suffer her to enjoy all the effects then in her possession, or which she might thereafter acquire, notwithstanding her coverture; and assigned the same to the plaintiff, as her trustee, and made the plaintiff his attorney to sue for the same in trust for his wife; and further covenanted with the plaintiff, that he would pay unto his wife, or to such person as she should appoint, for and towards her maintenance, an annuity of 19*l.* at the rate of 5*s.* per week, during her life, for all such time as she should live separate and apart from him, which she agreed to accept, in full satisfaction, for her support, maintenance, and alimony: provided, that if the defendant should pay any debt which his wife, during such separation and payment of the annuity, should contract, it should be lawful for him to withhold payment of the said weekly sum of 5*s.* until he should be reimbursed: that the defendant's wife upon this separation taking place, went to live with the plaintiff, her sister, and was furnished by her with the necessaries for which this action was brought; and that the defendant, having for some time failed in payment of the weekly allowance stipulated by the deed, this action was commenced to recover from him the amount of what had been furnished to his wife. In the course of the trial the deed of separation having been produced, the learned judge declared his opinion, that the plaintiff could not maintain the present action, framed as it was, and accordingly nonsuited the plaintiff. But a rule *nisi* was obtained for setting aside this nonsuit; and after argument the Court made the rule absolute, though the Chief Justice differed in opinion with the rest of the Court.

In the recent case of *Jee v. Thurlow*, (x) where an action was brought upon a deed of separation of three parts, between husband and wife, and trustee; reciting, that differences existed, and that the husband and wife had agreed to live separate, the husband covenanted to pay an annuity

(w) 2 New Rep. C.B. 148.

(x) 2 Barn. & Cress. 547.

to the wife, during so much of her life as he should live; and the trustee covenanted to indemnify the husband against the wife's debts, and that she should release all claim of jointure, dower, and thirds: the Court determined, that this deed was legal and binding, and that a plea by the husband, that the wife sued in the ecclesiastical court for restitution of conjugal rights, and that he put in an allegation and exhibits, charging her with adultery, and that a decree of divorce *à mensa et thoro* was in that cause pronounced, was not a sufficient answer to an action by the trustee for arrears of the annuity. And in this case *Abbott* Ch. J. said, "For a long series of years, all the judges when called upon to pronounce judgment in such cases, have felt themselves bound by former decisions, although each of them in his turn has said, that this opinion would probably have been different, had the question been *res integra*. In *St. John v. St. John*, the Lord Chancellor says, 'If this were *res integra* untouched by *dictum* or decision, I would not have permitted such a covenant to be the foundation of an action or a suit in this court. But if *dicta* have followed *dicta*, or decision has followed decision, to the extent of settling the law, I cannot upon any doubt of mine, as to what ought originally to have been the decision, shake what is the settled law upon the subject.' That opinion is a fit guide for us: ought not we to say, that if a new decision is to overturn all the former cases on this question, it must be the decision of that high tribunal, which is competent to give the law to all other tribunals, and rectify their errors whenever called upon to review them. For these reasons I cannot, sitting in this place, say that the deed is void. The only question, then, is upon the sufficiency of the plea. It has been decided, that a plea stating the commission of adultery by the wife is not sufficient, upon this ground, that if the husband, when executing such a deed as this, thinks proper to enter into an unqualified covenant, he must be bound by it. Had he wished to make the non-commission of adultery a condition of paying the annuity to his wife, he should have covenanted to pay it *quamdiu casta vixerit*. A plea of judgment in the ecclesiastical court, but not alleging the fact of adultery, is not at all more favourable for the defendant; our judgment must therefore be for the plaintiff."

But a deed made between husband and wife and a third person (a trustee), with a covenant by the husband to pay such third person an annuity, in case the wife should live separate and apart from her husband, and should take one of her children to reside with her, is void as being a deed made in contemplation of a future separation at the pleasure of the wife; and, therefore, contrary to the policy of marriage. (y)

Where husband and wife lived separate for many years, she supporting herself out of her own property, and the husband not having been

(y) *Durant v. Tilley*, 7 Price Rep. 577.

called upon, during that period, for a supply of necessaries, is not liable to be sued by any person who may have given her credit even for necessaries. (z)

So, where the wife elopes from her husband, and lives in a state of adultery, he is not liable for necessaries, though she be even desirous of returning, and offers to live with her husband. This was settled in the case of *Morris v. Martin*, (a) which was an action for necessaries provided for the defendant's wife. The defendant proved that she went away from him with an adulterer: and it was held, that the husband should not be charged for necessaries provided for her, though the plaintiff had no notice. And the Chief Justice *Raymond*, in a similar case of *Child and others v. Hardyman*, (b) said, "If a woman elopes from her husband, though she does not go away with an adulterer, or in an adulterous manner, the tradesman trusts her at his peril, and the husband is not bound. And this had been so adjudged in two or three cases. Indeed if he refuse to receive her again, from that time it may be an answer to the elopement. In this case he does not absolutely refuse to receive her again: but that she should neither sit at his table, nor have any government of the children, but should be kept in a garret; and she deserved no better usage."

So, in the case of *Govier v. Hancock*, (c) which was an action of *assumpsit* brought by the plaintiff for the board and lodging of the defendant's wife. The defendant, having committed adultery with a woman of the name of *Bazely*, whom he had brought home, treated his wife with great cruelty, and finally turned her out of doors. Then the wife committed adultery, after which she offered to return home, but her husband would not receive her; and this action was brought for her board and lodging subsequent to that time. *Buller* Just., before whom the cause was tried, was of opinion that the husband was not bound to receive the wife after she had committed adultery, and, consequently, was not bound to support her; and he directed a verdict for the defendant, with liberty for the plaintiff to move to enter a verdict for him, if the Court of King's Bench should be of opinion that the defendant was liable under these circumstances. Accordingly the plaintiff moved to set aside the verdict, on the ground that as the defendant had been the aggressor, and had turned his wife out of doors at a time when there was no imputation on her conduct, he was bound to provide for her, notwithstanding she afterwards committed adultery; that in this respect it differed from the case of the wife being the aggressor, and eloping with an adulterer, in which case the husband was discharged; that it

(z) *Lidlow v. Wilmot*, 2 Stark. Rep. 86.

(b) 2 Stra. 874, 5.

(a) 1 Stra. 647. See also 2 Stra. 706.

(c) 6 Term Rep. 603.

12 Mod. 372. S. P.

had never yet been determined that under these circumstances the husband was not liable, and that upon principle he was liable.

But the Court said, "That though this precise case did not appear to have been controverted before, it was probably because the point had not been doubted; and that it must be governed by the same principle on which it had been determined, that the husband is not liable in cases where the wife goes away with an adulterer. That this was not a modern rule, but was mentioned by Lord Coke, that if a wife go away with an adulterer she loses her dower. That the question depended upon this, whether the necessaries were provided before or after the wife had committed adultery: if after, the action could not be maintained. And that in this case if the wife had instituted a suit in the Ecclesiastical Court against the husband for restitution of conjugal rights, they would not have assisted her." The rule was accordingly discharged.

But, in the case of *Norton v. Fazan*, (d) which was an action of *assumpsit* for necessaries found for the defendant's wife and children. The facts were these: some time previous to the delivery of the goods, the defendant having discovered that his wife kept up an adulterous intercourse with another man, separated himself from her, leaving her in possession of the house which he had inhabited, together with two children bearing his name. In this house she was living in a state of adultery at the period when the goods in question were delivered. The defendant had made no regular provision for his wife. The cause was tried before *Eyre* Ch. J., who was of opinion that if the plaintiff knew or ought to have known that the separation proceeded from the adultery of the wife, the jury should find for the defendant; if not, that the plaintiff was entitled to recover. The jury found a verdict for the plaintiff. And upon a motion for a new trial, the Court were of opinion that the plaintiff was entitled to recover. And *Eyre* Ch. J. said: "If the defendant in another action brought against him by some other tradesman, shall be able to establish the notoriety of his wife's situation, he may defend himself. But as the case stands at present, this woman appears to have been living in a house in which she was placed by the defendant himself, together with two children bearing the husband's name, both of whom were born in wedlock. It is true, that she had an adulterous intercourse with another man, but that was not proved to be known to this tradesman. If the defendant can bring it home to any other tradesman who shall be in the same situation as the present plaintiff, that he did know or ought to have known the circumstances under which the wife was living, the defendant may, perhaps, be able to prevent another verdict passing against him."

(d) 1 Bos. & Pul. 226.

Buller Just. said, " Every case on the facts is peculiar to itself, and this is so different from every other case which has been decided in *Westminster Hall*, that I consider it as anomalous. The verdict is clearly and strictly right. The wife committed adultery for a considerable time while she was living with her husband; he voluntarily yielded his bed to the adulterer and made no provision for her. Then what colour of defence is left? Knowing of her criminal conduct, and having made no provision for her, he must maintain her as before."

It is observed, (e) that where the husband and wife are separated *a mensa et thoro* by sentence in the Ecclesiastical Court the law allows her alimony at the discretion of the judge, unless she has eloped and lives with an adulterer; and as the common law gives her a writ to recover this, it would seem that the husband is excused from the obligation of her contracts. So, where she is sentenced to a temporary confinement as a punishment for some crime, the husband has been held not liable to her agreement, even for necessaries, if she is kept in an improper place by the covin of the gaoler. (f) But in the case of *Manby v. Scott*, (g) the judges who argued for the plaintiff laid it down as clear law, that if a wife be prisoner for felony, and the gaoler provides her with food, that the husband may be charged for it.

5. OF CONTRACTS MADE BY A WOMAN LIVING WITH A MAN AS HIS WIFE.

If a man and woman live together, and pass in the world as husband and wife, the man shall be liable to all contracts entered into by the woman in the same manner as he would have been liable if they had been actually married. (h)

So, in the case of *Watson v. Threlkeld*, (i) which was an action of *assumpsit* brought to recover the amount of a quantity of linen drapery goods, furnished by the plaintiff to a woman who passed for the wife of the defendant. The plaintiff proved the delivery to the woman at the defendant's lodgings; that he had himself chosen some of the articles for her; that she used his name, and was called Mrs. *Threlkeld* in his presence. The defence relied on was, that this woman was not his wife, though she lived with him as such, but was a kept woman, and that that circumstance was known to the plaintiff when the goods were furnished. It was then pressed by the defendant's counsel, that however it had been held, that if a man permitted a woman to use his name and pass for his wife, he thereby subjected himself to the payment of her debts; it had

(e) 2 Stra. 1214. n. 1. 1 Bl. Com. 441.
Ellah v. Leigh, 5 Term Rep. 679.

(f) Vide *Fowles v. Dinely*, 2 Stra.
1132.

(g) 1 Sid. 118. But see 2 Lev. 16.

(h) 12 Mod. 372. Vin. Abr. tit. Baron
& Feme, D. b. pl. 38. Cowp. 235.

(i) 2 Esp. Rep. 637.

only gone to those cases where the tradesman had not known the real situation of the parties, but believed the woman to be actually married ; that it was meant as a punishment on the man, who, by permitting a woman to use his name, had thereby given her a false credit, derived from his situation in life, as passing for his wife ; but in the present case no such deceit was practised, no such false colours held out ; the plaintiff knew that the defendant was not married, so that he could not look to his credit, but to the woman's own, and that the plaintiff should therefore be nonsuited.

Lord *Kenyon* Ch. J. " It is certain that if a man has permitted a woman, to whom he was not married, to use his name, and pass for his wife, and in that character to contract debts, he is liable for her debts ; and I am of opinion that he is liable, whether the tradesman who furnished the goods knew the circumstances to be so or not. He gives her a credit from *his* name and cohabitation, and it is not to be supposed that the tradesman could look to the credit of a woman of that description, and not to that of the man by whom she was supported : I shall hold the credit to be given to him, and that he is liable." His lordship added, " What, however, I have said must not be taken to be the case of a common strumpet, who may assume the name of a person, without his authority, from having casually known him ; it must be where the man permits the woman to assume his name, where she lives in his house, and is part of his family."

So, where a woman marries a second husband before the death of the first (she believing the first to have been dead), and the second being wholly ignorant of the fact : it was held by *Parker* Ch. J. (k) " That for what she acquired during the cohabitation, he would esteem her as a servant to the second husband, and that he was entitled to the benefit of her labour."

6. HOW HUSBAND AND WIFE MUST SUE AND BE SUED JOINTLY.

Upon all contracts made with the wife before marriage, the husband and wife must sue and be sued jointly. (l) So, in the case of rent, where part accrues before and the remainder after the marriage, both must be joined. (m)

So, they ought to sue jointly in actions upon *promises*, which arise during coverture, where the wife may have an action for the same cause, if she survives her husband. Thus, if a *feme covert* has a mill, and one agrees with the husband and wife to grind all his corn at the mill, under

(k) 1 Stra. 80.

(l) 2 Com. Dig. tit. Baron & Feme,
V. Y. *Mitchinson v. Hewson*, 7 Term Rep.
348.

(m) *Richardson v. Hall*, 3 Mo. Rep.
307.

a penalty in default thereof, they ought to join; for the action would survive to her. (n) So, if a man promises to give a 100*l.* to the wife of J. S. they ought to join in action for the recovery thereof. (o) But the husband may sue alone upon a bill of exchange given to the wife before marriage, but which became due afterwards. (p) So, in an action for any thing due to the wife *en auter droit*, they ought to join: as if they sue for a debt, &c. to the wife as executrix or administratrix. (q) But, on a promise to pay a husband money due to his wife as executrix in consideration of his forbearing to sue for it, the husband alone ought to sue. (r)

When the wife is the meritorious cause of action, it has been ruled, (s) that the husband alone may sue, or the husband and wife may join, though damages only are recovered: as in *assumpsit* upon an express promise to the wife, after coverture, to pay her 10*l.* in consideration of a cure to be performed by her; the husband and wife may join, or the husband alone may sue. So, upon a promise to pay 8*l.* *per annum* to the husband and wife during coverture, they may join; or the husband alone may sue. (t) But when the wife cannot have an action for the same cause, if she survive her husband, the general rule of law is, that the action must be by the husband alone. (u) As, in an *indebitatus assumpsit* on an implied promise to pay for work done by the wife during coverture; the law presumes no promise to have been made to the wife; for she is the servant of her husband; and he is not only at the charge of the materials to carry on the work, but is also obliged to maintain his wife; and therefore it is the law considers the promise to have been made to him only. (v)

(n) *Denstan and wife v. Burwell*, 1 Wils. 224. See also 2 Wils. 214.

(o) *Per Curiam*, Bulst. 21.

(p) *M^cNeilage v. Holloway*, 1 Barn. & Ald. 218.

(q) *Com. Dig. tit. Baron and Feme*, V. 1 Salk. 282.

(r) *Yard v. Eland*, 1 Ld. Raym. 368. 1 Salk. 117. Carth. 462. S. C.

(s) *Cro. Jac.* 77. 205. 1 Sid. 25. 2 Sid. 128. 1 Salk. 114. *Com. Dig. tit. Baron & Feme*, X.

(t) *Com. Dig. tit. Baron & Feme*, X.

(u) *Com. Dig. tit. Baron & Feme*, W.

(v) 4 Mod. 156. 1 Salk. 114. 3 Salk. 63. Carth. 251. 8 Mod. 199, 200. 1 H. Bl. 108.

CHAPTER VII.

OF CONTRACTS WITH INFANTS: AND OF THE LIABILITY OF
PARENT OR CHILD FOR NECESSARIES.

1. **O**F CONTRACTS WITH INFANTS.] — By the common law a person is called an infant till the age of 21 years. (a) And all contracts with infants, except for necessities, are either void or voidable; (b) the reason of which is, the indulgence the law has thought fit to give infants, who are supposed to want judgment and discretion in their contracts and transactions with others, and the care it takes of them in preventing them from being imposed upon or overreached by persons of more years and experience. (c) Therefore if an infant be in trade, and contract a debt in buying goods, &c. for his trade, it is not recoverable against him, though he thereby gains his living. Thus in the case of *Whittingham v. Hill*, (d) which was an action of *assumpsit* for goods sold; the defendant pleaded that he was an infant: the plaintiff replied that the goods were for the necessary diet and apparel of the defendant and his family; the defendant rejoined that he kept a mercer's shop at *Shrewsbury*, and bought the goods to sell again, and traversed that he bought them *pro necessario*, &c.: the plaintiff thereupon demurred. And after argument, it was adjudged for the plaintiff. But afterwards upon a writ of error, the judgment was reversed. And the Court said: "This buying for the maintenance of the defendant's trade, though he gained thereby his living, shall not bind him, for an infant shall not be bound by his bargain for any thing but for his necessity, viz. diet and apparel, or necessary learning."

And the rule of law is said (e) to be the same in regard to a debt incurred in repairing houses belonging to an infant.

(a) Co. Lit. 171. b.

(b) Com. Dig. tit. Infant, B. 5. C. 2.

(c) Bac. Abr. tit. Infancy and Age. I. 3.

(d) Cro. Jac. 494. 2 Rol. Rep. 45.
See also 1 Rol. Abr. 729. l. 15. Dy. 104. b.

n. 18. 2 Stra. 1083. 2 Esp. Rep. 480.
S. P.

(e) 3 Salk. 196. Sed quare, vide 3 Bur.
1717. 2 Bulstr. 69.

So, a bill of exchange or other written contract made by an infant, is voidable by the infant. Thus, in the case of *Williams v. W. Harrison* and *R. Harrison*, (f) which was an action brought upon a bill of exchange drawn by the defendants, and protested for non-payment. *R. Harrison*, one of the defendants, pleaded infancy in bar; to which the plaintiff demurred, upon the ground that infancy was no bar to this action, it being founded on the custom of merchants. But the court without argument, over-ruled the demurrer, for they clearly held, "That infancy was a good bar notwithstanding the custom; for here the infant is a trader, and the bill of exchange was drawn in the course of trade, and not for any necessities; so judgment was entered, that the plaintiff *Nil capiat per Billam versus R. Harrison*. And *Holt*, Ch. J. cited a case, "That where an infant keeps a common inn, yet an action on the case upon the custom of inns will not lie against him, which is stronger than the principal case."

But although a bill be drawn, indorsed, or accepted, by a person under age, it will nevertheless be valid against all other persons who are competent parties to the instrument. (g) So, a bill drawn upon an infant, but accepted after he came of age, is valid against the acceptor himself. (h)

If an infant submit a matter to arbitration, and an award is made against him, he may perform the award, or avoid it at his election, as he may all other his contracts. (i)

A contract made with an infant cannot be converted into a *tort* so as to make him liable in that form of action. Thus, if one deliver goods to an infant upon a contract, &c. knowing him to be an infant, he shall not be chargeable in trover and conversion, or any other action for them; the infant being incapable of making any contract but for necessities; therefore, such delivery is a gift to the infant: but if an infant without any contract wilfully takes away the goods of another, trover lies against him: it is also said, that if he takes the goods under pretence that he is of full age, trover lies, because it is a wilful and fraudulent trespass. (k) So, in *Jennings v. Rundall*, (l) which was a special action on the case in *tort*; and the plaintiff declared that at the defendant's request he had delivered a mare to the defendant to be moderately ridden, but that the defendant maliciously intending, &c. wrongfully and injuriously rode the mare so that she was damaged, &c. It was holden, that the defendant might plead his infancy in bar, the action being founded on a contract. And Lord *Kenyon* Ch. J. said: "The law of *England* has very

(f) *Carth.* 160. *Holt.* 359. *S. C.*

(g) *Taylor v. Croker*, 4 *Esp. Rep.* 187.
See also 2 *Atk.* 181, 2.

(h) *Stevens v. Jackson*, 4 *Camph.* 164.

(i) *Bac. Abr.* tit. *Infancy and Age*, I. 5.

(k) See 1 *Sid.* 129. 1 *Lev.* 169. *Keb.*

905. 913.

(l) 8 *Term Rep.* 335. See *Green v.*

Greenbank, 2 *Mar. Rep.* 485.

wisely protected infants against their liability in cases of contract; and the present case is a strong instance to show the wisdom of that law. The defendant, a lad, wished to ride the plaintiff's mare a short journey; the plaintiff let him the mare to hire; and in the course of the journey an accident happened, the mare being strained; and the question is, whether this action can be maintained? I am clearly of opinion that it cannot; it is founded on a contract. If it were in the power of a plaintiff to convert that, which arises out of a *contract*, into a *tort*, there would be an end of that protection which the law affords to infants. Lord *Mansfield*, indeed, frequently said that this protection was to be used as a shield, and not as a sword; therefore if an infant commit an assault, or utter slander, God forbid that he should not be answerable for it in a court of justice. But where an infant has made an improvident contract with a person who has been wicked enough to contract with him, such person cannot resort to a court of law to enforce such contract. And the words 'wrongfully, injuriously, and maliciously,' introduced into this declaration, cannot vary this case."

But an action of *assumpsit* will lie against an infant to recover money *embezzled* by him. Thus, in the case of *Bristow* and others, assignees, &c. v. *Eastman*, (m) which was an action of *assumpsit* for money *had and received* to the use of the bankrupts before they became bankrupts. The defendant had been apprentice to the bankrupts, who were merchants, and, during his apprenticeship, had been entrusted by them to make entries at the custom-house, and pay other sums of money on their account. He had frequently charged larger sums of money than those he actually paid, and the present action was brought to recover back the over-charges. The defendant attempted to defend himself, on account of his being an infant at the time. But Lord *Kenyon* Ch. J. said, "The question was new, and had not been decided; but he was of opinion that this action, though in *form* arising *ex contractu*, in fact arose *ex delicto*, and as he could not have defended himself by reason of his infancy if an action of *trover* had been brought for the money, so he ought not to be permitted to defend himself on that ground, in this action." The plaintiffs, however, proved that the defendant acknowledged the fraud, and promised payment after he came of age, so that the point was not determined; the plaintiffs obtaining a verdict on this evidence.

An infant is liable in *detinue* for goods delivered to him for safe custody, &c. and which he refuses to return. (n)

As to the acts of infants being void or voidable, it is said, (o) there is a diversity between an actual delivery of the thing contracted for, and

(m) *Peake's Cas. N. P.* 323. 1 *Esp. Rep.* 172. S. C. (o) *Bac. Abr. tit. Infancy and Age, I.* 3. And see *Perk. s. 12. 19. Rol. Abr.*

(n) 1 *New. Rep.* 140. 1 *Rol. Abr.* 530. 730. L. 5. 2 *Rol. Rep.* 408. *Latch*, 10.

a bare agreement to deliver it only, that the first is voidable, but the last absolutely void; as if an infant deliver a horse or a sum of money with his own hands, this is only voidable, and to be recovered back in an action of account. But if an infant agrees to give a horse, and does not deliver the horse with his hand, and the donee takes the horse by force of the gift, the infant shall have an action of trespass, for the grant was merely void.

It is also laid down as a general rule, (*p*) that infancy is a personal privilege, of which no one can take advantage but the infant himself; and therefore, though the contract of the infant be voidable, yet it shall bind the person of full age; for being an indulgence which the law allows infants, to protect and secure them from the fraud and imposition of others, it can only be intended for their benefit, and is not to be extended to persons of full age, who are presumed to act with sufficient caution and security; and were it otherwise, this privilege, instead of being an advantage to the infant, might in many cases turn greatly to his detriment.

Therefore it hath been adjudged, (*q*) that if an infant let a house to J. S., an adult, reserving rent; and the rent be in arrear, the infant may distrain for the rent, or bring an action of debt; though it should be objected that such a contract, is not reciprocal.

So, where an infant brought an action on the case by her guardian, and set forth, (*r*) that she gave the defendant 10*l.* and put herself to be her servant for seven years, and that, in consideration thereof, the defendant promised to find her with all necessaries, save only apparel, and likewise promised to teach her to sing and to dance; and that the defendant, within the time turned her out of the house, and did not teach her to sing and dance; whereupon there was judgment by default, and a writ of enquiry of damages: it was moved to stay the filing of the writ of enquiry because here was no consideration, the agreement not being reciprocal; but the court held, that though the contract might be void as to the infant, yet it bound her mistress, who was of full age; and therefore ordered the writ of inquiry to be filed. So, where an infant brought an action of *assumpsit*, by his guardian, and declared; (*s*) that whereas the defendant entered into his close, and cut his grass: that in consideration the plaintiff would permit him to make it into hay, and carry it away, the defendant promised to give him six pounds for it. To this declaration the defendant demurred, upon the ground that there was no legal consideration to support the promise; for the infant was not bound by his permission, but might sue the defendant for the trespass notwithstanding. The Court, however, gave judgment for the

(*p*) 1 Show. 171. 3 Mod. 248. See also Bac. Abr. tit. Infancy and Age, I. 4.
 (*r*) 1 Sid. 446. 2. Keb. 623.
 (*s*) 1 Vent. 51. 1 Mod. 25.
 (*q*) 1 Sid. 446. 1 Mod. 25.

plaintiff. And in a similar action upon a promise to pay the plaintiff, an infant, the value of certain land, in consideration that he would suffer the defendant to hold and enjoy it, after the death of A. to the time of his fullage; the plaintiff had judgment, although it was agreed that he was not bound by the contract. (t) So, on a promise to an infant to do such an act, in consideration that the infant promised to pay such a sum; in an action of *assumpsit* by the infant, he had judgment, though the money was not paid; for the court held, that the infant's promise was only voidable at his own election, and not at the election of him to whom it was made. (u) And if a man of full age and a female of fifteen promise to inter-marry, and after request by her, he marries another woman, an action on the case lies against him for the violation of the contract; for though it was objected that this was *nudum pactum* and not reciprocal, as the man could not compel her, being an infant, to perform her promise, yet being voidable as to herself only, as she finds it for her benefit, it shall bind him, being of full age. (v)

If an infant lose money at play, which the winner takes, such taking is a conversion, and trover, or *indebitatus assumpsit* will lie for the infant for the sum so received: but if the infant had won, he might have retained the money, and no action would have laid against him for it. (w)

But where a person under age had paid a sum of money as the consideration for granting him a lease of certain premises, but, upon his coming of age, he avoided the lease, and afterwards brought an action to recover back the money so paid: It was determined (x) that he could not maintain such an action. And *Gibbs* Ch. J., in delivering the judgment of the court, said, "It is quite clear that a person who accepts a lease during his infancy, may avoid it after he becomes of age, and before confirmation. But he has merely an election to avoid it. He may avoid the performance of the covenants contained therein, or the payment of rent, but he can go no further. But with respect to the consideration that an infant may have given for a lease, he is not by law entitled to recover it back, although there may be a complete failure of such consideration by subsequent events; for an infant having paid money as a consideration for a lease, is confined to his election of retaining the lease, or putting an end to it, but cannot recover back the money paid for it. I have not been able to find any case where an action at all analogous to the present has ever been brought, but in that of *Drury v. Drury*, (y) which was afterwards carried to the House of Lords, under the name of the Earl of *Buckinghamshire v. Drury*, (z) the question was, whether a woman married under the age

(t) 2 Sid. 109.

(u) 1 Sid. 41. 1 Keb. 1.

(v) 3 Stra. 937. Fitzg. 175. 279.

(w) Cited in 2 Stra. 937. Fitzg. 279.

(x) *Holmes v. Blogg*, 2 Mo. Rep. 552.

(y) Hil. 1 Geo. 3. before Lord *Northington*. 2 Eden's Cases in Chancery, 59.

(z) 3 Bro. Parl. Cas. 492. 2 Ed. Wilmot's Notes of Opinions and Judgments, 177. 2 Eden's Rep. 60.

of 21, having before such marriage a jointure made to her in bar of dower, was thereby bound and barred of dower within the statute of the 27 Hen. 8.: and it was judged that that statute extended to adult women only, infants not being particularly named; and therefore that notwithstanding a jointure on an infant, she might waive the jointure, and elect to take dower. That point was determined by Lord *Northington*.^(z) And it further appears from a MS. note of Mr. Justice *Wilmut*,^(a) that Lord *Hurdwicke* and Lord *Mansfield* were of that opinion, and that Lord *Mansfield* in delivering his judgment in that case, said, "that infants were not bound by their agreements, was never held universally any where in the world; that by our law some agreements bind absolutely, some are void, some are voidable; that if the transaction were fair, a bargain and sale of lands by an infant for necessities would be good, that infancy never authorized fraud, as if goods were delivered to an infant and he embezzled them, trover would lie against him; or if he took an estate, and was to pay rent for it, he should not hold the estate, and defend himself against payment of the rent by pretence of infancy, but that if an infant pays money *with his own hand, without a valuable consideration*, he cannot get it back again, and that if he receives rent, he cannot demand it again when of age." What then is the point in this case? The plaintiff during his infancy paid a sum of money to the defendant for a valuable consideration, namely the granting of a lease, from which he received a benefit for a certain period. Lord *Mansfield's dictum*, therefore, goes far beyond the present question, and it appears not only to have been his positive opinion, but is expressly referred to and approved of by Mr. Justice *Wilmut*; and as no objection appears to have been since raised to it, it may very fairly be adopted in the present instance, and on that ground, therefore, we are of opinion that this action cannot be maintained, the payment in question having been made by the plaintiff during his infancy.

OF CONTRACTS FOR NECESSARIES.]—It is clearly agreed in all the books, that if an infant makes a contract for necessities, it is neither void nor voidable^(b): indeed, if this could be done it is truly observed,^(c) "that miserable must the condition of minors be; excluded from the society and commerce of the world; deprived of necessities, education, employment, and many advantages, if they could do no binding acts. Great inconvenience must arise to others, if they were bound by no act. The law, therefore, at the same time that it protects their imbecility and indiscretion from injury through their own impru-

^(z) Vide *Wilmut's Notes of Opinions and Judgments*, 181.

^(a) *Ibid.* 226. 2 Eden, 72.

^(b) Co. Lit. 172. a.

^(c) Per Lord *Mansfield*. 5 Burr. 1801.

dence, enables them to do binding acts for their own benefit, and, without prejudice to themselves, for the benefit of others."

Therefore if an infant contracts for his necessary diet, apparel, washing, lodging, or education, it shall bind him. (*d*) So, if he contracts for physic, or for his cure with a surgeon when he is wounded. (*e*) Or, if he be a housekeeper and contracts for necessaries for himself, his wife, and family. (*f*)

But an infant is not liable for necessaries provided in order for his marriage. (*g*) Nor upon a contract to pay so much *per annum* for his diet and schooling. (*h*) So, a promise by an infant, in consideration that A. had expended 7*l.* for his diet and teaching, to pay him that sum, is not binding upon him. (*i*) But instructing an infant in a useful trade, seems to fall within the description of *necessaries*. (*k*)

A captain in the army, being under age, is liable to pay for a livery ordered for his servant, as necessaries, but not for cockades ordered for the soldiers of his company. (*l*) So, a member of a volunteer corps being an infant is liable for regimentals furnished him during his non-age. (*m*) But a chronometer is not a necessary for a lieutenant in the navy. (*n*)

In all cases it must appear that the articles furnished were actually necessary, and suitable to the infant's estate and condition, of which the court and jury will determine; (*o*) and the law distinguishes between persons as to the fitness of necessaries; as, for instance, between a nobleman and a gentleman's son: so also, as to the time and place of education; as at *school*, *Oxford*, and the *inns* of court. (*p*) An infant who lives with, and is properly maintained by her parent, cannot bind herself to a stranger for necessaries. Thus, in the case of *Bainbridge v. Pickering*, (*q*) which was an action for feathered caps, and other ornamental apparel sold to the defendant, who at the time of the sale was an infant, and lived with her mother. *Gould* Just. said, "If an infant lives with her parent, who provides such apparel as appears to the parent to be proper, so that the child is not left destitute of clothes, or other real necessaries of life, I apprehend that the child cannot bind herself to a stranger even for what might otherwise be allowed as necessaries: for no man shall take upon him to dictate to a parent what clothing the child shall wear, at what time they shall be purchased,

(*d*) Co. Lit. 172. a. Sir *W. Jones*, 146. 182. 1 Rol. Abr. 729. l. 5, 6. 30. 55. Latch. 157. Dy. 104. b. in marg. 1 Sid. 112. Mar. 40.

(*e*) Co. Lit. 172. a. Pal. 528.

(*f*) 1 Sid. 112. Cart. 215. 1 Stra. 168.

(*g*) Ibid.

(*h*) 1 Rol. Abr. 729. l. 35. Pal. 528.

(*i*) Sir *W. Jones*, 182.

(*k*) See *Woodeson's* Lec. 402. n. f.

(*l*) 8 Term Rep. 578. See also Cart. 215.

(*m*) *Coates v. Wilson*, 5 Esp. Rep. 152.

(*n*) *Berrolles v. Ramsey*, Holt's Ni. Pri. Rep. 77.

(*o*) Bac. Abr. tit. Infancy and Age, I. 1. Com. Dig. tit. Enfant, B. 5. Cro. Eliz. 583.

(*p*) Vide Cart. 215.

(*q*) 2 Bl. Rep. 1325.

or of whom. All that must be left to the discretion of the father or mother. And as there is not here any pretence but that the child was decently provided for by the mother, I think we should give no countenance to such persons as inveigle young women into extravagance under the pretext of furnishing them with necessaries, without the previous consent of the parent."

So, it is incumbent on a tradesman before he trusts an infant with what may appear to be necessaries, to enquire whether he is provided by his parents or friends: as was determined in the case of *Ford v. Fothergill* (r) which was an action of *assumpsit* for work and labour as a tailor. The facts were these; the defendant, being under age, came to the house of the plaintiff in company with a gentleman who was previously a customer of his, and ordered a coat, waistcoat, and two pair of breeches, which were to be sent to the *Grecian Coffee-house*, and were accordingly sent there. The defendant proved, that at this time he was provided by his father with all things necessary for his support. He had been very extravagant, and his father had, in the course of the year 1793, when this debt was contracted, paid many other debts contracted with other tailors to a large amount. Lord *Kenyon* Ch. J. said, "Nothing is clearer in the law than that an infant cannot contract a debt except for necessaries. It is absolutely necessary that he should have the power of making that contract, otherwise he would starve. As to the plaintiff not knowing his fortune it is no excuse; it was incumbent on him to enquire into that, and to prove it to the jury. Whether he was living with his father or not, the person who dealt with him was bound to enquire and know who he was. He was living at a coffee-house, itself no mark of a wary disposition; the plaintiff should have enquired there, and gone to his father and enquired of him whether he was in want of these cloaths. Circumstanced as this case is, such an enquiry ought to have been made."

If an infant comes to a stranger, who instructs him in learning, and boards him, there is an implied contract in law, that the party shall be paid as much as his board and schooling are worth; but if the infant, at the time of his going there, was under the age of discretion, or if he were placed there by a guardian, or friend, who agreed to pay for his board and education, the party that boarded him has no remedy against the infant, but must resort to the person with whom he agreed. (s) It is also said, (t) "that it hath, of late years, been several times determined, that where a parent or relation, &c. places an infant at a boarding school, the credit being given to such parent, relation, &c. the master cannot have any remedy against the infant."

(r) *Peake's Cas.* N. P. 229. 1 Esp. Rep. 211. S. C.

(t) 3 Bac. Abr. 595. in marg. last edit. by *Gwillim*.

(s) *Duncomb v. Tickridge*, Allen 94.

A fine due by an infant on an admittance to a copyhold estate, is recoverable against him during his minority. Thus, in the case of *Evelyn, bart. v. Chichester*, (u) where it appeared that a copyhold estate devolved on the defendant when he was an *infant of six years of age*: a fine was assessed, and he was admitted to the estate on his coming of age. *Assumpsit* was brought for this fine; and, upon a case reserved for the opinion of the Court of King's Bench, the question was, whether *assumpsit* would lie for the fine, which the jury found to be a reasonable one. The court held clearly, that the action lay: and *per Yates Just.* "If the defendant was still an infant, I should think this action maintainable. Debt, perhaps, would not lie, because an infant cannot wage his law; but *assumpsit*, I think, would lie, as the infant continued to occupy and enjoy the estate. In 2 Bulstr. 69. *Kirton v. Elliot*, the plaintiff recovered against an infant the rent upon a lease made to him: and it is there said, "if a lease be made to an infant, and he occupies and enjoys, he shall be charged with the rent. An infant may contract for necessities. He could not have received the rents and profits of this copyhold without admittance; and he must previously pay the fine for such admittance. But here, he has affirmed the whole transaction: he has enjoyed two years since he came of age."

If an infant contracts for necessities, and enters into a single bill, it is said, (x) he shall be bound by such obligation: though he certainly is not liable upon a bill of exchange or other negotiable instrument. (y) So, if money be actually laid out and expended in the purchase of necessities for an infant, he shall be liable for the amount so laid out. (z) So, money paid for an infant to procure his liberation from an arrest for a debt contracted for necessities, may be recovered against him by action at law. (a) But though an infant may bind himself in a *single bill* for necessities, yet if he enter into an obligation, and a *penalty* be annexed to it, such obligation is void: Thus in the case of *Ayliff v. Archdale*, (b) where it appeared upon demurrer, that the plaintiff had paid certain money for the necessary meat and drink of the defendant, being an infant, and took an *obligation is the double sum* for the payment thereof; and whether this were good or voidable was the question. The whole court held it to be void: but if the plaintiff had taken an obligation of the very sum which he laid out for his necessary maintenance, it had been otherwise. If,

(u) 5 Bur. 1717. Bul. N. P. 154.

(x) 1 Rol. Abr. 729. l. 20. Cro. El. 920. 1 Lev. 86. Co. Lit. 172. a. Carth. 160. 2 H. Bl. 514.

(y) See *Williams v. Watts*, 1 Campb. 552.

(z) 5 Mod. 368. 10 Mod. 67. 12 Mod. 197.

(a) 5 Esp. Rep. 28.

(b) Cro. El. 920. See also Co. Lit. 172. a. Mo. 679. Godb. 219. 2 H. Bl. 514. See also *Fisher v. Mowbray*, 8 East Rep. 330.

however, an infant and a surety enter into an obligation with a penalty for necessities found for the former, the bond will bind the surety, although it will not bind the infant. It is also said, (c) that if an infant becomes indebted for necessities, and enters into a bond, with a penalty for the amount, this shall not drown the simple contract, because the bond has no force. So, if one lends money to an infant, who actually lays it out for necessities, yet this shall not bind the infant, nor subject him to an action, for it is upon the lending that the contract must arise; and the law will not intrust an infant with the application and laying out of money; and the infant's applying it afterwards for necessities, will not, by matter *ex post facto*, entitle the plaintiff to an action. (d) So, an *insimul computassit*, or account stated, lies not against an infant, though the particulars of the account be for necessities; for the law considers an infant as not having sufficient discretion to agree to an account, and the *assumpsit* is upon the account. (e)

OF CONTRACTS MADE WITH INFANTS OUT OF ENGLAND.] If an action be brought against an infant upon a contract made with him in *Scotland*, to which infancy is pleaded, or given in evidence under the general issue, the defendant, at the trial, must be prepared to prove, what the law of that country is in regard to infants, otherwise he will be liable. Thus, in the case of *Male v. Roberts*, (f) which was an action of *assumpsit* for money paid, laid out, and expended to the use of the defendant, money lent and advanced, to which the defendant pleaded the general issue of *non assumpsit*. The case, as opened by the plaintiff's counsel, was, that the plaintiff and the defendant were performers at the *Royal Circus*; while the company were performing at *Edinburgh*, in *Scotland*, the defendant had become indebted to one *Cockburn* for *liquors* of different sorts, with which *Cockburn* had furnished him; not having discharged the debt, and it being suspected that the defendant was about to leave *Scotland*, *Cockburn* arrested him, by what is there termed a writ of *Fugé*; the object of which is to prevent the debtor from absconding. The defendant being then unable to pay the money, the plaintiff paid it for him, and he was liberated. The present action was brought to recover the money so paid, as money paid to his use. The defence relied upon was, that the defendant was an infant when the money was so advanced. But Lord *Eldon* Ch. J. said: "It appears from the evidence in this cause, that the cause of action arose in *Scotland*, the contract must be therefore governed by the laws of that country where the contract arises. Would infancy be a good defence by the law of *Scotland*, had the action been commenced there?" For

(c) Bac. Abr. tit. Infancy and Age, I. 1.

(e) *Trueman v. Hurst*, 1 Term Rep. 40.(d) Vide 1 Salk. 279. 387. 5 Mod. 368.
10 Mod. 67. Bul. N.P. 154.

(f) 3 Esp. Rep. 163.

the defendant it was contended, that the contract was to be governed by the laws of *England*, in which case the plaintiff could recover for necessaries only. That at all events it should not be presumed that the laws were different, and as it appeared that the debt did not accrue for necessaries, the plaintiff could neither recover on the counts for money paid, or for money lent to an infant. His Lordship then said, "What the law of *Scotland* is with respect to the right of recovering against an infant for necessaries, I cannot say; but if the law of *Scotland* is, that such a contract as the present could not be enforced against an infant, that should have been given in evidence; and I hold myself not warranted in saying, that such a contract is void by the law of *Scotland*, because it is void by the law of *England*. The law of the country where the contract arose, must govern the contract; and what that law is, should be given in evidence to me as a fact. No such evidence has been given, and I cannot take the fact of what that law is, without evidence."

OF CONTRACTS WITH INFANTS, AFFIRMED BY A NEW PROMISE MADE WHEN AT FULL AGE.] The privilege which the law allows to infants being entirely calculated for their benefit, and to prevent frauds being practised upon them during their *minority*, hence at their full age, they are at liberty either to affirm or disaffirm their contracts, or to avoid them. Therefore, if an infant be furnished with *goods*, which do not come within the description of *necessaries*, and after he comes of age, he ratifies the contract by a promise to pay, he is bound by such promise, and liable to be sued thereon for the debt. (g) So, if an infant give a bond, and at full age promise payment, it shall bind him. (h) And if a man enters into an obligation for payment of money for an infant, and the infant, after he comes of age, promises, in consideration that the obligee had entered into the bond and paid the money, he would pay him the debt; this promise is valid and sufficient to support an action. (i) So, also, where an infant borrowed money, and afterwards at full age promised payment; this is a good consideration for the promise, and he shall be charged. (j) But to bind a person to the payment of a debt contracted during his infancy by a new promise, made by him at full age, it must be an absolute unequivocal promise to pay. For, in the case of *Thrupp v. Fielder*, (k) Lord *Kenyon* Ch. J. said, "The case of infancy differs from the statute of limitations: in the latter case, a bare acknowledgment has been held to be sufficient.

(g) *Southerton v. Willock*, 2 Stra. 690.
Borthwick v. Carruthers, 1 Term Rep.

648.

(h) Cro. El. 127. 700. Dy. 272. a. in
 marg. 1 Rol. Abr. 18. l. 50.

(i) *Edmond's Case*, 3 Leon. 164.
 4 Leon. 5.

(j) Comb. 381.

(k) 2 Esp. Rep. 628.

In the case of an infant, I shall hold an acknowledgment not to be sufficient, and require proof of an express promise to pay, made by the infant after he has attained that age when the law presumes that he has discretion. Payment of money made, as in the present case, is no such promise." And such a promise must also be made *voluntarily*, and given with knowledge that the party was discharged by his non-age. (l) So, if a promise be made by one after he comes of age, to pay a debt contracted during his minority when he is able, his ability to pay must be proved; but it is sufficient to show his ostensible appearance, and his circumstances as they are open to the observation of the world. (m)

OF A JOINT CONTRACT MADE WITH AN INFANT AND AN ADULT.] If a contract is made by an infant and an adult, they cannot both be sued thereon, but the action should be brought against the adult only, as being the sole contracting party in point of law. Thus, in the case of *Chandler v. Parkes and Danks*, (n) which was an action of *assumpsit*, for work and labour, and materials found for both defendants. *Parkes*, one of the defendants, pleaded the general issue of *non assumpsit*; the other defendant pleaded infancy. The plaintiff entered a *nolle prosequi* as to the defendant *Danks*, and proceeded to issue with the other defendant *Parkes*. Lord *Kenyon* Ch. J., on the case being opened, and looking into the record, said, "he doubted how the plaintiff could recover against one defendant only, in an action on a contract which he by his declaration had stated to be a joint one against two; that the infancy being admitted, the plaintiff ought to have discontinued, and commenced a new action against the adult defendant, as being the sole contracting party according to the legal effect of such a contract, which was void against the infant." The plaintiff's counsel contended, that the promise of an infant was not void, but voidable only; and if the plaintiff had declared against the adult defendant only, he could have pleaded in abatement, that the contract was a joint one; and quashed the plaintiff's writ. Lord *Kenyon* said, "he continued of the same opinion, for the plea in abatement could not prevail, when it was disclosed that the other defendant was an infant."

An infant must sue and defend by guardian and not by attorney. (o)

2. OF THE LIABILITY OF A PARENT TO PROVIDE NECESSARIES FOR HIS CHILDREN.] — A father is bound to provide necessaries for his own children. But a second husband cannot at law be compelled to maintain

(l) *Harmer v. Killing*, 5 Esp. Rep. 102. Vide Cro. El. 700. S. P.

(m) *Cole v. Sarby*, 5 Esp. Rep. 159.

(n) 3 Esp. Rep. 76. 5 Esp. Rep. 47.

S. P. 5 Taunt. Rep. 307. 4 Taunt. Rep. 468.

(o) Co. Lit. 135. b. 2 Inst. 261. 390 and see 2 Saund. Rep. 117. f. 1. 2 Stra 784.

his wife's children by a former husband. (p) Indeed, if the second husband do maintain such children it is a good consideration for a promise by them when they come of age to repay the expence of their maintenance respectively ; especially where the second husband is a man of small substance, and the children have a competent provision to receive when they come of age, and he made no application to Chancery for an allowance out of the fund, as he might have done. Thus, in the case of *Cooper v. Martin*, (q) which was an action of *assumpsit* for meat, drink, washing, lodging, and other necessaries provided by the plaintiff for the defendant for seven years. At the trial, before *Grose J.* at the *Spring Assizes*, 1803, for the county of *Suffolk*, the case appeared to be as follows : The defendant was the son of the plaintiff's wife by a former husband, and he and three other children of the former marriage were maintained by the plaintiff for several years during their minority ; and after the defendant came of age, and a demand was made upon him by the plaintiff for the expences of his maintenance, the defendant promised to pay it. The situation of the family was this ; the defendant's father died insolvent, and the plaintiff did not appear to have any substance of his own, having been obliged to sell a small estate, which he had at the time of his marriage, to satisfy certain creditors to whom his wife had bound herself for her former husband's debts. But she had a freehold estate of about 100*l.* *per annum* clear value, with a house upon it, in which she and her children were living when she married the plaintiff, and in which they all continued to reside for some years, till the defendant left them, when about the age of nineteen. This estate of hers, and the fortune of the defendant and the rest of her children came to them by the will of her uncle, whereby he devised all his messuages, lands, &c. at *Wickham*, to certain trustees, in trust, to pay the clear rent and profits to his niece *Ann*, the wife of *John Martin*, during her life, for her own separate use ; remainder to certain of her children. He then devised about 20*l.* a year in land to each of her children, (including the defendant,) with a proviso in case of the death of any of the children before the age of twenty-one years respectively, without leaving issue of their body, that the estate so given to the child so dying was to be sold by the trustees, and the money to be shared among the survivors, as and when they should respectively come of age. And to each of the children was further given a legacy of 500*l.*, and the testator directed the same, with the accumulating interest, to be paid as and when they should respectively attain the age of twenty-one years, with the same proviso as before in case of the death of either before age. It also appeared that the plaintiff had brought up the children, and given them boarding in a manner suitable to their expectations, but beyond

(p) *Tubb v. Harrison*, 4 Term Rep. 118.

(q) 4 East Rep. 76.

what could have been expected of him, upon a supposition that no provision was made for them out of which he might thereafter be reimbursed when they came of age. A sister of the defendant, who still lived in the plaintiff's family proved that in a conversation with the defendant, in which she had mentioned her own intention of paying for her board, the defendant said that he should have paid the plaintiff, but for his elder brother, who had advised him not to do so. The plaintiff's claim was at the rate of twenty guineas a-year board, washing, and lodging; for five years and upwards. The learned judge left it to the jury, whether the plaintiff had supplied the defendant with more than his state and condition required? that if he had not, or to the extent at least that was necessary and proper, it was a meritorious consideration to support the promise made by the defendant after he came of age. The jury were of opinion that the expence incurred by the plaintiff in the maintenance of the defendant amounted to 20*l.* a-year, but that according to the defendant's state and condition there ought not to have been more than 10*l.* a-year expended upon him; and therefore they found a verdict for the plaintiff for 50*l.* for 5 years. And the defendant had leave to move for a rule either to enter a nonsuit, if the Court thought that the action was not maintainable, or why a new trial should not be had. A motion to this effect was accordingly made in the court of King's Bench. But that Court, after argument, were of opinion that the action was maintainable; and therefore refused the rule.

Lord *Ellenborough* Ch. J. said: "As to the general obligation of parents and children to provide for each other, in *Tubb v. Harrison* (r) which is the latest decision upon the subject, and in which the other authorities were considered, it was holden to extend only to *natural relations*. Then the plaintiff, not standing in that relation to his wife's children by her former husband, was not bound by the act of marriage with their mother to maintain them, but stood in that respect in the situation of any other stranger. And having done an act beneficial for the defendant in his infancy, it is a good consideration for the defendant's promise after he came of age. In such a case the law will imply a request; and the fact of the promise has been found by the jury. The cases both at law and in equity have certainly gone on considering a child so circumstanced as being entitled to maintenance out of the fund, and the plaintiff might have applied to Chancery for an allowance in this case: but though he did not make such application, but expended his own funds for the benefit of the defendant, it is a good consideration at least for the subsequent promise to repay him."

Lawrence J. "The early cases referred to (s) proceeded upon a mistake in considering the maintenance of the children as a debt of the

(r) 4 Term Rep. 118. *Foley*, 39. 42. (s) Sty. 283. 2 Bulstr. 346. Comb. 321

mother, who has married a second husband, or as a debt on her estate. The wants of the children are only a ground for an order of maintenance on the parent if of sufficient ability. But when she has parted with that ability by her second marriage she is no longer liable. The husband only takes her debts; but this is no debt of hers. Ceasing to be of ability, the maintenance of the children could not have been enforced by an order against her, and therefore could not have been enforced at all. Then the plaintiff having conferred the benefit without any obligation, it is a good consideration for the promise by the defendant after he came of age."

But, if a husband receives his wife's children by a former husband into his house, and they become part of his family, he shall be deemed to stand *loco parentis*, and be liable to a contract made by his wife for their education. Thus, in the case of *Stone v. Carr*, (*t*) which was an action of *assumpsit*, brought by the plaintiff, who was a schoolmaster, for the education and maintenance of an infant child. It was proved that the child was the son of the defendant's wife, by a former husband. On the defendant's marriage with the child's mother, he had taken possession of a house which she occupied with her children, and which house had belonged to the first husband: the business she had carried on was continued, and the children were suffered to live with him as part of the family, and provided for by him while he was at home. For the defendant it was given in evidence,—that he was gunner of an *India* ship; that during his absence on a voyage, the boy had been put to school by his mother to the plaintiff. His counsel then contended, that as he had never made any contract, or agreement with the plaintiff, he could not be charged, by reason of any implied liability; and cited the case of *Tubb v. Harrison*, (*u*) as in point.

Lord Kenyon Ch. J. after referring to the case cited, said the present was distinguishable from that: "there was no doubt if a man married a woman having children by a former husband, he might refuse to provide for them, and under the authority of the *King v. Munden*, cited in the case of *Tubb v. Harrison*, he could not be compelled to do it; but if a man did not so refuse to entertain them, and took the children into his family, he then stood *loco parentis* as to them. Such was the case here: he had so adopted them, and having gone abroad, and left them in the care of his wife, he should hold him to be bound by her contracts made for their maintenance and education. If she had any property by her first husband, the case was stronger; for then part of the property of which the defendant possessed himself, belonged to the children: but even had their father died insolvent, it would not alter his opinion. The defendant on his marriage had no right to take possession of the house and business: he had thereby confounded all the boundaries of

(*t*) 3 Esp. Rep. 1.

(*u*) Ante, 630.

the property, and placed himself in a state of responsibility. He therefore directed the jury to find a verdict for the plaintiff, which they did accordingly.

So, if a husband, living in a state of separation from his wife, suffers his *own* children to reside with their mother, he is liable for necessaries furnished to the children: for, as a father, he has a right to the custody of his children, and may obtain possession of their persons by *habeas corpus*; but where he does not assert that right, and suffers them to remain with their mother, he thereby constitutes her as his agent, and authorizes her to contract those debts for clothing and other necessaries; but this is matter which should be left to the jury.(v)

But where a father living in the country gives his son, residing in *London* a reasonable allowance for his expences, the son is alone liable for necessaries furnished to him in *London*, and the father is not chargeable. (w) So, where the father of a bastard child having adopted it as his own, though no order of bastardy has been made on him, is liable for necessaries furnished the child. (x)

So, an action will lie for meat and drink found and provided for a *bastard child* upon an express promise. (y) And so, in an action of *assumpsit* on an express promise to pay for the maintenance of a bastard child, of which the defendant was the putative father, it is no defence that he has since discovered that the child was not his child. (z)

(v) Per Lord Eldon Ch. J. 3 Esp. Rep. 352.

(y) Per Pemberton Ch. J. 2 Sho. 184.

(w) *Crantz v. Gill*, 2 Esp. Rep. 471.

N. P. 29.

(x) *Hesketh v. Gowing*, 5 Esp. Rep. 131.

(z) *Shaw v. Whiteman*, Peake's Cas.

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A TABLE

Explanatory of Abbreviations of References to Books

IN THIS WORK.

<i>Atk.</i>	Atkin's Reports.
<i>Amb.</i>	Ambler's Reports.
<i>Andr.</i>	Andrew's Reports.
<i>Bl. Com.</i>	Blackstone's Commentaries.
<i>Bl. Rep.</i>	Sir W. Blackstone's Reports.
<i>Bac. Abr.</i>	Bacon's Abridgment.
<i>Barnard.</i>	Barnardiston's Reports.
<i>Bul. Ni. Pri.</i>	Buller's Nisi Prius.
<i>Barn. & Ald.</i>	Barnewall and Alderson's Reports.
<i>Bro. Parl. Cas.</i>	Brown's Parliamentary Cases.
<i>Bro. Ch. Cas.</i>	——— Chancery Cases.
<i>Burr.</i>	Burrow's Reports.
<i>Bulst.</i>	Bulstrode's Reports.
<i>Bos. & Pul.</i>	Bosanquet and Puller's Reports.
<i>Bro. Abr.</i>	Brook's Abridgment.
<i>Brod. & Bing.</i>	Brodrip and Bingham's Reports.
<i>Bing.</i>	Bingham's Reports.
<i>Barn. & Cres.</i>	Barnewall and Creswell's Reports.
<i>Co. Lit.</i>	Coke upon Littleton.
<i>Com. Dig.</i>	Comyn's Digest.
<i>Cro. Eliz.</i>	Croke Elizabeth's Reports.
<i>Cro. Car.</i>	——— Charles's Reports.
<i>Cro. Jac.</i>	——— James's Reports.
<i>Cowp.</i>	Cowper's Reports.
<i>Campb.</i>	Campbell's Reports.
<i>Carl.</i>	Carter's Reports.
<i>Com. Rep.</i>	Comyn's Reports.
<i>Carth.</i>	Carthew's Reports.
<i>Comb.</i>	Comberbach's Reports.
<i>Dy.</i>	Dyer's Reports.
<i>Doug.</i>	Douglas's Reports.
<i>Danv.</i>	Danver's Abridgment.
<i>Dow.</i>	Dow's Reports in Parliament.
<i>Dowl. & Ryl.</i>	Dowling and Ryland's Reports.
<i>East or East. Rep.</i>	East's Reports.
<i>Esp. Rep.</i>	Espinasse's Reports of Cases at Nisi Prius.
<i>Fitzgib. or Fitzg.</i>	Fitzgibbon's Reports.
<i>Godb.</i>	Godbold's Reports.
<i>Hob.</i>	Hobart's Reports.
<i>Holt's Ni. Pri.</i>	Holt's Nisi Prius Cases.
<i>H. Bl.</i>	Henry Blackstone's Reports.
<i>Hardw.</i>	Cases Tempore Hardwicke.
<i>Hardr.</i>	Hardres' Reports.
<i>Inst.</i>	Coke's Institutes.
<i>Jenk.</i>	Jenkin's Cases.
<i>Keb.</i>	Keble's Reports.
<i>Lev.</i>	Levinz' Reports.
<i>Leon.</i>	Leonard's Reports.
<i>Lord Raym.</i>	Lord Raymond's Reports.
<i>Lutw.</i>	Lutwich's Reports.
<i>Moor.</i>	Moor's Reports.

TABLE OF ABBREVIATIONS.

<i>Mo</i>	Moore's Reports.
<i>Mar. or Marsh</i>	Marshall's Reports.
<i>Maule & Sel. & M. & S.</i>	Maule and Selwyn's Reports.
<i>Man. Index</i>	Manning's Index.
<i>Mod</i>	Modern Reports.
<i>New Rep. C. B</i>	New Reports Common Pleas.
<i>Pl. Com</i>	Plowden's Commentaries.
<i>Poph</i>	Popham's Reports.
<i>Phil. on Evid</i>	Phillip's Law of Evidence.
<i>Peake N. P.</i>	Peake's Nisi Prius.
<i>Peake's Cas. Ni. Pri</i>	Peake's Cases at Nisi Prius.
<i>P. Wms</i>	Pierre Williams's Reports.
<i>Price Rep</i>	Price's Reports in the Exchequer.
<i>Rol. Abr</i>	Rolle's Abridgment.
<i>Rol. Rep.</i>	Rolle's Reports.
<i>Rose</i>	Rose's Bankrupt Cases.
<i>Salk</i>	Salkeld's Reports.
<i>Sid</i>	Siderfin's Reports.
<i>Stra</i>	Strange's Reports.
<i>Show</i>	Shower's Reports.
<i>Sty</i>	Style's Reports.
<i>Shep. Touch</i>	Sheppard's Touchstone.
<i>Saund</i>	Saunders's Reports.
<i>Stark</i>	Starkie's Reports.
<i>Skin</i>	Skinner's Reports.
<i>Selw</i>	Selwyn's Nisi Prius.
<i>Scho. & Lef</i>	Schoales and Lefroy's Reports.
<i>Swan. Rep.</i>	Swanston's Reports.
<i>Term Rep. and T. R.</i>	Term Reports.
<i>Taunt. Rep</i>	Taunton's Reports.
<i>Talb</i>	Talbot's Reports.
<i>Ves. jun</i>	Vesey junior's Reports.
<i>Vent</i>	Ventris' Reports.
<i>Vin. Abr</i>	Viner's Abridgment.
<i>Wils</i>	Wilson's Reports.
<i>Yelv</i>	Yelverton's Reports.

THE END.

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